(26,615)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 529.

ELIZABETH HULL, ADMINISTRATRIX OF JOHN M. HULL, DECEASED, FOR THE BENEFIT OF ELIZABETH HULL, MOTHER OF DECEASED, PETITIONER,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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1 In the Court of Appeals of Maryland.

Record No. 48.

ELIZABETH HULL, Administratrix of John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased, Appellant,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY, a Corporation, Appellee.

Appeal from the Circuit Court for Washington County.

Omer T. Kaylor, Frank G. Wagaman, for Appellant.
H. H. Keedy, Jr., Charles C. Keedy, for Appellee.

Filed January 7th, 1918.

Office Supreme Court, U. S. Filed Jun- 21, 1918. James D. Maher, Clerk.

2 *Transcript of Record from the Circuit Court for Washington County in the Case of*

ELIZABETH HULL, Administratrix of John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased, Appellant,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY, a Corporation, Appellee.

To the Court of Appeals of Maryland.

Omer T. Kaylor, Frank G. Wagaman, for Appellant.
H. H. Keedy, Jr., Charles C. Keedy, for Appellee.

3 In the Circuit Court for Washington County—No. 90 Trials—November Term, 1917.

ELIZABETH HULL, Administratrix of John M. Hull, Dec'd, for the Benefit of Elizabeth Hull, Mother of Deceased,

versus

THE PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation.

Titling and Narr.

In the Circuit Court for Washington County—Action, Case—No. 18 Appearances—November Term, 1917.

ELIZABETH HULL, Administratrix of John M. Hull, Deceased for the Benefit of Elizabeth Hull, Mother of Deceased,

vs.

THE PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation.

STATE OF MARYLAND,
Washington County, To wit:

The plaintiff, Elizabeth Hull, administratrix of John M. Hull, deceased, who sues for the benefit of Elizabeth Hull, mother of John M. Hull, deceased, by her attorney, Frank G. Wagaman, sues the defendant, The Philadelphia and Reading Railway Company, for that the defendant is now and has been a corporation duly incorporated since before the happening of the injuries hereinafter complained of, and was at the time of the happening of said injuries and still is a common carrier by railroad, engaged in commerce between the States of the United States, and that the said John M. Hull was at the time of the injuries and death hereinafter complained of, and for some time prior thereto had been a servant and employee of the defendant, and that on or about the 17th day of March, 1917, at about 2 o'clock A. M., the said plaintiff was employed and engaged in the performance of his duties as a brakeman on a freight train of the defendant carrying merchandise and freight from Harrisburg in the State of Pennsylvania to Hagerstown, in the State of Maryland, and that whilst he was so employed, and whilst said
4 train was at a standstill upon the tracks of the defendant at or near Harrisburg, in the State of Pennsylvania, it became and was his duty to pass from one portion of said train to another portion thereof, and in so doing the said plaintiff walked upon the track of the defendant, parallel to the track upon which the said train was standing; that the said train was standing upon the track of the defendant for the purpose of adding additional cars to said train; that it was usual and customary for trains to stand at said place for such purpose, and that said point in said tracks had long been used for such purpose, and it became necessary when said tracks

were used for said purpose and for a long time had been customary for the employees of the defendant to walk upon the aforesaid parallel track while engaged in the performance of their duties in connection with the train standing at said point, and that the said defendant was then operating other locomotives in the vicinity of said train, and that it then and there became and was the duty of the employees of the defendant operating and having control of said other locomotives to keep a lookout for the employees of the defendant who might be upon said parallel track, and to warn them of the approach of the locomotives so running upon said parallel track; yet the said defendant while the plaintiff was upon said parallel track, as aforesaid, and while he was at a place where it was customary and usual for employees of the defendant to be, negligently and carelessly caused a locomotive in the charge and control of an engineer who was then and there an employee of the defendant, to be driven over said parallel track without keeping any lookout for the persons who might then be upon said track, and without sounding any bell or whistle or any other warning to the said plaintiff, whereby the said locomotive was driven against and over the body of the said John M. Hull, and the said John M. Hull, as a result thereof, on or about the 17th day of March, 1917, died; and for that the said John M. Hull left surviving him no widow and no children and no father, but did leave surviving him the said Elizabeth Hull, his mother; that the said Elizabeth Hull was dependent upon the said John M. Hull for her support and maintenance. and had a reasonable expectation of pecuniary benefits resulting from the continuance of the life of the said John M. Hull, and the plaintiff says that as a consequence of the negligence aforesaid, the said Elizabeth Hull has been caused great loss and damage by being deprived of the support and maintenance furnished *by* her by the said John M. Hull and being deprived of her reasonable expectation of pecuniary benefits to arise from the continuance of the life of the said John M. Hull.

6 *Second Count.*

(Filed Aug. 20th, 1917.)

And for that the defendant is now and has been a corporation duly incorporated since before the happening of the injuries hereinafter complained of and was at the time of the happening of said injuries and still is, a common carrier by railroad, engaged in commerce between the States of the United States and that the said John M. Hull was at the time of the injuries and death hereinafter complained of, and for sometime prior thereto, had been a servant and employee of the defendant and that on or about the 17th day of March, 1917, at about two o'clock A. M., the said plaintiff was employed and engaged in the performance of his duties as a brakeman on a freight train of the defendant carrying merchandise and freight from Harrisburg in the State of Pennsylvania, to Hagerstown, in the State of Maryland, and that whilst he was so employed, and

whilst said train was at a stand-still upon the tracks of the defendant, at or near Harrisburg in the State of Pennsylvania, it became and was, his duty to pass from one portion of said train to another portion thereof, and in so doing the said plaintiff walked upon the track of the defendant, parallel to the track upon which the said train was standing; that the said train was standing upon the track of the defendant for the purpose of adding additional cars to said train; that it was usual and customary for trains to stand at said place for such purpose and that said point in said tracks had long been used for such purposes and it became necessary when said tracks were used for *became necessary when said tracks were used for* said purpose and for a long time had been customary for the employees of the defendant to walk upon the aforesaid parallel track while engaged in the performance of their duties in connection with the train standing at said point; and that the said defendant was then and there operating another locomotive in the vicinity of said train, which locomotive was then and there in the charge and control of an engineer who was then and there in the employ of the defendant; that the last aforesaid employee of the defendant then and there knew that the empolyees of the defendant then engaged in the operation, management and control of the said freight train, were upon, or would probably be upon, the track of the defendant parallel to the track upon which said freight train was then standing; and that it then and there became and was
6 the duty of the said engineer of the defendant in charge and control of said other locomotive, before and while causing his locomotive to be propelled along and over the said parallel track, to keep a look-out for the said employees in charge of the train aforesaid, and by ringing the bell and the blowing of the whistle, to warn said employees of the approach of said locomotive; yet the said engineer without keeping a look-out, as aforesaid, and without ringing the bell and blowing the whistle, negligently and carelessly caused said engine to be run backwards over said parallel track and against and over the body of the said John M. Hull, and the said John M. Hull, as a result thereof, on or about the 17th day of March, 1917, died; and for that the said John M. Hull left surviving him no widow and no children and no father, but did leave surviving him, the said Elizabeth Hull, his mother; that the said Elizabeth Hull was dependent upon the said John M. Hull for her support and maintenance and had a reasonable expectation of pecuniary benefits resulting from the continuance of the life of the said John M. Hull, and the plaintiff says that, as a consequence of the negligence aforesaid, the said Elizabeth Hull has been caused great loss and damage by being deprived of the support and maintenance furnished her by the said John M. Hull, and by being deprived of her reasonable expectation of pecuniary benefits to arise from the continuance of the life of the said John M. Hull.

And the plaintiff claims ten thousand ($10,000.00) dollars damages.

FRANK G. WAGAMAN,
Attorney for Plaintiff.

Third Count.

(Filed Dec. 12th, 1917.)

The plaintiff, Elizabeth Hull, administratrix of John M. Hull, deceased, who sues for the benefit of Elizabeth Hull, mother of John M. Hull, deceased, by her attorney, Frank G. Wagaman, sues the defendant, The Philadelphia and Reading Railway Company, for that the defendant is now and has been a corporation duly incorated since before the happening of the injuries hereinafter complained of and was at the time of the happening of said in-
7 juries and still is a common carrier by railroad, engaged in commerce between the States of the United States and that the said John M. Hull was at the time of the injuries and death hereafter complained of, and for sometime prior thereto, had been a servant and employee of the defendant and that on or about the 17th day of March, 1917, at about two o'clock A. M., the said decedent was employed and engaged in the performance of his duties as a brakeman on a freight train of the defendant carrying merchandise and freight from Harrisburg in the State of Pennsylvania to Hagerstown in the State of Maryland, and that whilst he was so employed and whilst said train was at a stand-still upon the tracks of the defendant, at or near Harrisburg in the State of Pennsylvania, it became and was his duty to pass from one portion of said train to another portion thereof, and in so doing the said decedent walked upon the track of the defendant, parallel to the track upon which the said train was standing; that the said train was standing upon the track of the defendant for the purpose of adding additional cars to said train; that it was usual and customary for trains to stand at said place for such purpose and that said point in said tracks had long been used for such purpose and for a long time had been customary for the employees of the defendant to walk upon the aforesaid parallel track while engaged in the performance of their duties in connection with the train standing at said point; and that while the decedent was walking along said parallel track in the performance of his duties as aforesaid, another locomotive of the defendant in the charge and control of an engineer who was then and there an employee of the defendant, negligently and carelessly proceeded along and over said parallel track to, against and over the person of the decedent, the aforesaid negligence and carelessness being the negligent failure to bring said locomotive to a stop after having been given a proper signal to stop, and the said John M. Hull, as a result thereof, on or about the 17th day of March, 1917, died; and for that the said John M. Hull left surviving him no widow and no children and no father, but did leave surviving him the said Elizabeth Hull, his mother; that the said Elizabeth Hull was dependent upon the said John M. Hull for her support and maintenance and had a reasonable expectation of pecuniary benefits resulting from the continuance of the life of the said John M. Hull and the plaintiff says that as a consequence of the negligence aforesaid, the said Elizabeth

Hull has been caused great loss and damage by being deprived of the support and maintenance furnished her by the said John
8 M. Hull, and by being deprived of her reasonable expectation of pecuniary benefits to arise from the continuance of the life of the said John M. Hull.

OMER T. KAYLOR,
FRANK G. WAGAMAN,
Att'ys for Plaintiff.

(Summoned.)

Pleas.

(Filed Oct. 18th, 1917.)

In the Circuit Court for Washington County—No. 90 Trials—November Term, 1917.

ELIZABETH HULL, Administratrix of John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased,

VS.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation.

The defendant, the Philadelphia and Reading Railway Company, by Henry H. Keedy, Jr., and Charles C. Keedy, its attorneys, for pleas to the plaintiff's declaration and each count thereof, says:

1. That it did not commit the wrong alleged.

2. That John M. Hull was not on or about the seventeenth day of March, 1917, or at any other time, a servant or employee of the defendant.

HENRY H. KEEDY, JR.,
CHARLES C. KEEDY,
Att'ys for Defendant.

Issue joined on first plea.

Second plea traversed.

Issue joined on traverse.

9 *Motion and Affidavit for a Continuance.*

(Filed Dec. 12th, 1917.)

In the Circuit Court for Washington County—No. 90 Trials—November Term, 1917.

ELIZABETH HULL, Administratrix, etc.,

VS.

THE PHILADELPHIA AND READING RAILWAY COMPANY.

The defendant in the above entitled cause respectfully moves the Court to continue the said case for the reason that the evidence of

Ross W. Fulton, a witness who resides in Rutherford, in the State of Pennsylvania, but who is now in the service of the Government of the United States, and is located at Camp Gordon, Atlanta, Georgia, is material, competent and proper in this suit; that it believes the case cannot be tried with justice to it without such evidence; that it has used proper and reasonable endeavors to procure the same, and that it has reasonable expectation and belief that the same can be hereafter procured in some reasonable time.

HENRY H. KEEDY, JR.,
CHAS. C. KEEDY,
Attorneys for Defendant.

STATE OF MARYLAND,
Washington County, To Wit:

I hereby certify that on this 12th day of December, 1917, before the subscriber, the Clerk of the Circuit Court for Washington County, personally appeared John R. Saul, Agent for the Philadelphia and Reading Railroad Company, the defendant in the above entitled cause, and made oath in due form of law that the testimony of Ross W. Fulton, an absent witness, is material, competent and proper in said suit; that he and the defendant believe that said cause cannot be tried with justice to the said defendant without such evidence; that proper and reasonable endeavors have been made to procure the same; that said Ross W. Fulton is a resident of Rutherford, Pennsylvania; that he is now in the military service of the Government of the United States; that this affiant as Agent for the Philadelphia and Reading Railway Company, endeavored to find out where the said Ross W. Fulton was stationed, and learned that he was stationed at Camp Meade, in the State of Maryland; that as soon as the defendant learned that the above cause had been set for trial for the 12th day of December, 1917, this affiant, on behalf of the defendant, started to make arrangements to procure the attendance of the said Ross W. Fulton at the trial of the said case, but on the 7th day of December ascertained that the said Ross W. Fulton had been transferred from said Camp Meade and was now stationed at Camp Gordon, Atlanta, Georgia; that this affiant immediately sent a telegram to the said Ross W. Fulton requesting him to be present at the trial of the said case in Hagerstown, Maryland, on the said 12th day of December, 1917, but the said Ross W. Fulton cannot leave the said Camp without the permission of his superior officers having been first had and obtained; that between the time it was ascertained that the said Ross W. Fulton was stationed at said Camp Gordon and the day set for the trial of the said case, there was not sufficient time to obtain the said permission; that he has a reasonable expectation and belief that the attendance of the said Ross W. Fulton can hereafter be procured in some reasonable time; that he believes the said Ross W. Fulton, if present at the trial, would testify as follows:

"On the 17th day of March, 1917, I was employed by the Philadelphia and Reading Railway Company, and on the morning of the

said day I was engaged as fireman on engine Number 1125; that the said engine was a pusher or helper engine; that with said engine I had pushed an eastbound freight train from P., H. & P. junction to M. B. tower; we then crossed over to the westbound track, and then to the receiving track, and were returning to P., H. & P. junction to push another train when one came along. I was in the cab on the left side of the engine; had the cab window open; flagman Shoemaker was in the cab with me; we were running westwardly, tank first light; had two classification lights on the rear of the tank; they were burning brightly. I had my head out of the cab window and was looking ahead. I started to ring the engine bell at Thirteenth street overhead bridge, and was ringing it up to the time the engine stopped. Just before we got to the Thirteenth street overhead bridge, I saw two white lights about fifteen or eighteen car lengths ahead of us. I did not know whether they were on our track or along the side of it. When our engine was past
11 the Thirteenth street bridge, the lights disappeared. I could see the righthand rail of our track ahead of the tank only a very short distance. The air went on the engine and we came to a stop after moving a little over a car length. I went out on the front of the engine and saw a Western Maryland conductor. We walked back and found a Western Maryland brakeman lying upon the rails of our track about one-half a car length east of our engine. He was dead. I did not see the white lights after we passed the Thirteenth street bridge. I did not see the man get hit by our tank. This happened in the Harrisburg yard about eight or ten car lengths east of the westbound board. The Western Maryland engine was stopped at the board. We were running at a speed of about five miles an hour. We were running westward on the receiving track. There was an eastbound freight train passing at the time this happened. The Western Maryland train was stopped on the westbound track."

And the said John R. Saul further made oath as aforesaid that he is the Agent of the Philadelphia and Reading Railway Company, duly authorized to make this affidavit, and that he has personal knowledge of the matters and things herein stated.

EDWARD OSWALD,
Clerk of Circuit Court.

The plaintiff to sustain the issues joined on her part produced the following evidence:

Mr. ROBERT A. WARNER, called on behalf of the plaintiff, testified as follows:

Direct examination:

I knew John M. Hull in his lifetime. He was killed March 27th, 1917. For almost ten years prior to that time I was employed by the Western Maryland Railway Company. During a part of that time members of crews of the Western Maryland ran over the tracks

of the Philadelphia & Reading. Hull was killed in the Harrisburg yard on the receiving track close to the P., H. & P. Junction.
12 He was a member of my crew at that time. The other members of the crew of which he was a member were H. H. Kraft, engineer, T. M. Bard, fireman, R. A. Warner, conductor, F. L. Poole, flagman, John M. Hull, middle brakeman, and Mark C. Artz, front brakeman. At the time Hull was killed he was engaged on the train of which I was conductor, a freight train, which originated in the Rutherford Yard of the Philadelphia & Reading Railroad Company. We had taken a train from Hagerstown, Md., to Rutherford, Pa. I couldn't tell the exact time we arrived there. It was some time the day before and we had taken eight or more hours rest and were called for about 12:15 A. M. on the 17th of March on the Philadelphia & Reading by the Yard Master of the Rutherford Yard of the west bound yard. The yard master was the yard master of the defendant railway. We were directed by the yard master of the Philadelphia & Reading to get a train of cars off the west bound yard and pick up seven cars at Harrisburg. I cannot say about what time we started from Rutherford. Some time after 12:15. I would say possibly about 1:10 or 1:15, along there. I do not know where the first stop was made after leaving Rutherford. The defendant's railroad extends from Rutherford west, where it connects with the Western Maryland at Lurgan. We stopped in the Harrisburg Yard for the purpose of picking up seven cars as we had been directed by the yard master. We proceeded from Rutherford to Harrisburg on the westbound main track on which track our train was standing when we stopped to pick up these cars. We added these cars to our train at that point which was a usual or customary place for the purpose of stopping a train for picking up or adding cars to it. They often stopped trains there for that purpose. I was riding on the rear of the rear car of the seven cars when we backed up to the engine to couple these cars. There was a track on the right-hand side of our train as it was headed towards Lurgan and several tracks on the left-hand side. The first track immediately on the left is the eastbound main track. After the cars were coupled to the train I gave the engineer the signal that everything was O. K. to go when he received the right board. Then I started in the company of Hull to walk down the parallel track to give him instructions as to the work he was supposed to do after we left there. It was usual and customary for persons making up a train there to walk on that track for the reason that the walking between the rails was better walking because here was often cinders or debris laying between the tracks. I couldn't say how long it was customary for employees to walk the
13 track. I wouldn't attempt to say that it is a law or a rule of the company but it is a custom ever since I have been working there. I had been running there as a conductor about seven or eight months and as a brakeman I guess a year—that is, a year prior to the time of the accident.

I walked with Mr. Hull on that track westward toward the engine of our train. Each of us had a lighted lantern. We walked toward the right-hand rail, walking westward—Hull to my left.

As soon as the coupling was made I looked westward to see if anything was coming, and I saw nothing moving. I didn't expect anything for the reason that there were some cars. There were no cars or engines on the receiving track in the direction of our engine. There were some on the east end of the track when we pulled into the Harrisburg Yard. If those cars had still been there, this engine that came on could not have come down the receiving track without moving the cars. As Hull and I were walking down this track towards Hagerstown and toward our engine, I instructed Hull just what I wanted him to do when we left the Harrisburg Yard. As we were walking something hit me in the back. I was telling Hull just what I wanted him to do. I wanted him to let the train pass by him, as the train passed over the River bridge coming toward Hagerstown. I told him to drop off and look the cars over as they pulled by and see if there was any breaking. I told him that I was going back to the cab to write my cars up; that is, place these cars that I had picked up on a report; and during this conversation something hit me in the back, and I thought it was Hull playfully reaching out and hitting me, and I looked aside and seen Hull going under the engine, and then I propped myself against the end sill of the tender and kept my feet from under the step on the rear of the tender, and throwed my left arm over the lever that is used for the purpose of breaking the engine loose from cars, drawed myself up to the step and swung around and opened the angle cock, which is the air line, and applied the air brakes to the engine that the engineer was on, and by that time he was crawling down off the engine and asked me what was the matter, and I told him that he had killed my brakeman. I then went around to the Rutherford end of the engine, and about two rail lengths to the Rutherford end lay Hull's body along the righthand rail; he was dead. The wheels had not run over him. The engine went about four or five car lengths from the time it struck me until I applied the air brakes and it
14 came to a stop. I cannot say how far the engine went after I applied the air, but it didn't go very far—possibly a few feet—because that applied the air brakes in emergency and that will stop an engine very quickly. I did not hear any engine bell ringing before the engine hit me or at the time it hit me or at the time I was running along trying to keep out of the way of it. At no time while I was on the parallel track did the whistle of that locomotive give me any warning. The yard master at the Rutherford Yard gave me instructions as to the operations connected with the movement of that train. The destination of my train was Hagerstown, Maryland. The Harrisburg mentioned is Harrisburg, Pennsylvania, and we were hauling freight and merchandise from Harrisburg to Hagerstown.

The Philadelphia & Reading Railway supplied the person to take the place of Hull as a member of the crew. I couldn't positively say what official. It was through the yard master at Harrisburg that

the man was called—the night yard master. I know it was through the yard master because I asked him if he was going to get a man to fill his place, and he told me that he would have a man called. George F. Pell took the place of Hull. I have been speaking about the yard master of the Philadelphia & Reading Railroad. I know it was the yard master of the Philadelphia & Reading because he gave me instructions that came from the Philadelphia & Reading to take up cars from their tracks. The conductor receives his instructions from the yard master, and the yard master receives his instructions from the train master. He must be a Philadelphia & Reading official or he couldn't be working on Philadelphia & Reading property. I did not know Mr. Pell before this. I never saw him before. I know he was not an employee of the Western Maryland Railway because he wasn't put on by the Western Maryland. The Philadelphia & Reading put him on, and they had no way of getting a Western Maryland employee there. As to whether the yard master was employed by the Philadelphia & Reading, he was giving me official instructions on the Philadelphia & Reading property and out of the Philadelphia & Reading office, and he had taken my statement from myself to the Philadelphia & Reading Railway and from myself to the Department of Labor and Commerce at Harrisburg. I mean my statement in reference to the accident. I know he was acting official during the time of the accident and until the time we disposed of the body. The office has a sign on it that tells you it is P. & R. property.

15 I am acquainted with the tracks of the defendant from Harrisburg to Rutherford. A locomotive would have to use the westbound track of the defendant in order to proceed in the same direction that our train was moving to come on the track behind the place where our train was standing. When I was walking down the track with Hull a train was passing up the eastbound main from Hagerstown direction to Rutherford. It was moving on the lefthand side or on the opposite side of the train from where I was. I was on the right side, and that train on the left side, walking towards Hagerstown.

My lantern was in good condition and Hull's lantern was in good condition, because it was practically a new lantern at that time. The lights, which were white, were burning all right. It was the usual railroad lantern. It was a dark night. The track that I was walking on was not lighted in any artificial way. There are some lights in the Harrisburg Yard up there over to the left, and my train would obstruct that light from coming on the track where we were walking.

In my opinion, the speed of that engine as I was moving on in front of it after it struck me, was about four or five miles an hour. That engine, running at the rate of four or five miles per hour, could be stopped in twenty feet. When the engine was brought to a stop by the application of the air brake, it was standing about two car lengths behind the place the engine on our train was standing. Two car lengths west towards Rutherford from my engine. The engine of my train was headed towards Hagerstown. The other engine

stopped about two car lengths behind our engine towards Rutherford. I would judge that the length of a car is about thirty-five feet.

Cross-examination:

I was employed by the Western Maryland Railway Company. I ran elsewhere than from Hagerstown to Rutherford and from Rutherford back to Hagerstown. I ran to Cumberland or to Baltimore. I got all over the eastern division. The Chief Clerk directs where I am to go and when. There is one in the daytime and one at night. C. V. Gordon calls me. He is now chief clerk in the daytime. I do not know the night clerk's name. They are employees of the Western Maryland Railway Company. Mr. Hull was a member of my crew for about a month prior to this accident, I believe.

On this occasion I had been called at Hagerstown to take a
16 train to Rutherford, and had been there eight hours or over, and then had been called by the yard master at Rutherford to take a train to Hagerstown. I couldn't just recall the name of the man who called me. I know the man in the office at that time. I couldn't say whether it was Mr. Whitman or Mr. Jerard that called me. I know he is an employee of the P. & R. As a legal answer, I couldn't tell you whether he is an employee of the Western Maryland jointly with the P. & R. I don't know which answer. I know he is not an employee of the Western Maryland. I wouldn't know whether or not his wages or any part of them are paid by the Western Maryland Railway. I wouldn't guess the Philadelphia & Reading—no, I couldn't positively say I know whether he received any money from any other railway company or not. I know that Western Maryland trains do run into the Rutherford Yard. The train that I took to Rutherford was originally on the Western Maryland. C. V. trains also. I was called by the yard master that night with a call slip. They bring the call slip over, waken me up, and I sign it and acknowledge the call. They call it a call. They called Warner and crew. The engine was 754. They did not call for crew of Western Maryland engine 754. They called engine 754, which was a Western Maryland engine. That was the call. There were no names on that slip. The slip read, You are to report to take train 754 to leave Rutherford at 12.15 A. M., and left a blank space for signature of the conductor and blank space for signature of engineman. That was the call I got and signed that morning, and in pursuance I called the crew to that engine. I was then instructed by the yard master as to what to do. I have no way to know the yard master that gave me instructions what to do, whether any part of his wages was paid by the Western Maryland Railway Company, and I do not know. My rules which I receive from the Western Maryland, both copies, directed or instructed me to obey the orders of my yard master. The rules that instructed me to obey that particular yard master at that time were special rules in our time-table that told us while on the P. & R. rails at Shippensburg we were subject to the rules and special instructions of the Philadelphia & Reading

Railway Company, and that was given me by the Western Maryland Railway Company.

I noticed some cars at the east end of the Harrisburg Yard on the receiving track when we pulled into the Harrisburg Yard. I couldn't say how long that was before the accident. I presume—it has been so long ago—it possibly might have been in my report. I
17 might have something in there but it is going on to nine or ten months and I couldn't recall. If I had remembered the time we arrived there then I could tell. I would judge about 15 minutes; 10 or 15 minutes, more or less. Those cars must have been taken out during the time that we were in the yard but I did not see them taken out. I saw the cars there after Mr. Hull made the coupling. I wouldn't be able to see them when I started with Mr. Hull to walk toward the engine because it was dark. I looked and couldn't see them and didn't see them. I couldn't tell you how many cars were there; more than a dozen, I believe. They were standing at the Rutherford end of the track. They were standing close to the scale office, just west toward Hagerstown, that is the east end on the cross siding just west of the scale office. I couldn't say approximately how many feet or how many cars the scale office is from the place of the accident. It holds eighteen cars I guess from the 13th Street Bridge to the Water-stand pipe; they must have come down with a dozen cars, that were standing down in the rear end; standing close to the Rutherford end or wreck train track—that is only my judgment. I couldn't say how close that would be from the place of the accident. I could only guess five or six car lengths —along there—east of the place of the accident; the west end of those cars should have been about that far.

I know there is a cross-over or switch in there from the west-bound main track to the receiving track. By the way the cars were standing it wasn't west of the west end of those cars. There was no cross-over, to my knowledge, west of the west end of those cars. I know as a fact that there is only one there. There was only one way to get in from the westbound main track to the receiving track and that was at the west end of the receiving track.

When I started after my train was finally coupled, I gave the signal to the engineer and as far as I was concerned it was all right to go ahead and I looked toward Rutherford and then Mr. Hull and I got on the receiving track and started to walk toward our engine and while we were doing that, I was giving Mr. Hull instructions as to what he was to do. He was to get on the engine and then off the engine and inspect the train as it was going over the bridge. Mr. Hull and I were walking at a very slow gait, just merely walking and that is all. You know how you would walk, when you would be giving instructions, not fast, very slow pace. I wouldn't be
18 making a mile an hour. I had walked possibly one or two car lengths before I was struck. The majority of those cars were about 35 feet. At that time there was an eastbound freight train to the left of my train. From the exhaust of the engine as it went by and from my experience from going up there with tonnage trains before that train was not going over six or seven miles an hour be-

cause it was a very heavy grade eastward. The engine was making noise when we passed and of course there is a little noise connected with the train—a rumbling noise. I didn't hear the bell of that engine ringing and couldn't say whether it was ringing or not. His whistle didn't blow as I went up there. I was not listening to see whether or not the bell of that engine was ringing because I had no reason at all to listen. I was not listening whether there was a bell on any engine ringing. I didn't expect an engine. I can't say that the bell on the engine that struck me was not ringing. When Mr. Hull got on the engine I expected to ride back to the rear of the train on the caboose of the eastbound train. It was a freight train but I couldn't say positively of what road.

The Yard Master at Harrisburg supplied a man to take Hull's place but I do not know by what company the wages of that Yard Master were paid. I had no business to know. The persons who have charge of the employees and who have charge of the trainmen start with the yard master, assistant train master, train master, assistant superintendent, superintendent, assistant and general manager clean up to the president. The superintendent of motive power has nothing to do with the supervision to my knowledge. I have never seen anything stating that I was under his instructions. I am instructed by the general manager not through word of mouth but by the book of rules that when I am on the line of the Philadelphia & Reading that I should obey the rules and instructions of that company. None of those people ever instructed me verbally.

I receive my pay from the Western Maryland Railway Company. I never received any pay directly from the Philadelphia & Reading as a trainman. I had been running up to Rutherford for about a year prior to this accident as brakeman but not a year as conductor. Mr. Hull had been running about a month as my regular middle brakeman. As brakeman for me he had made approximately ten trips.

19 Redirect examination:

I had never received any instructions from the Philadelphia & Reading as to the use of that receiving track. The only instructions I ever received from anybody about the receiving track were just during examination from the examiner. I was being examined by the engineer of signals. I don't know his name. He was examining for the Philadelphia & Reading Railway. I was examined as a conductor, so that I could run over the rails without a pilot. I had to name all the switches, all the automatic signals, all the interlocking plan, etc. That examination and instruction gave me instructions as to the use or non-use of the receiving track. That examination was made in the summer of 1916. I never received any instructions from the officials but I had to tell the man who gave me my examination that I knew what it was for. He laid the blue print in front of me and asked me to read the blue print, P&H&P, and also the switch pulley and track and right boards. I had to explain to him what the purpose of the track was for and what we had to do before we could use it, the man that examined me on the physi-

cal characteristics on the road. The place where I got the information as to what was the proper use of that track was only through rules and special instructions in the form of bulletins that they put up from time to time. The special examiner did not state whether or not my answers to the questions with respect to the use of that receiving track were correct or incorrect, but I passed. The man's name was Davis, Engineer of Signal Department.

I have been running over there for a year, and know what use can be made of that receiving track. The book from the Philadelphia & Reading Railway, marked 20064, is the book of rules governing employees of the Philadelphia & Reading Railway. A copy of that book was issued prior to March, 1917, and has in it the rules that were in force in March, 1917.

Recross-examination:

My book is the same as this book. I got it from the train master's clerk of the Western Maryland, John Stone. I couldn't say whether Mr. Hull had one of those books or not.

20 ROBERT A. WARNER, recalled.

Direct examination:

The 13th street bridge is the first bridge after passing the scale office going toward Hagerstown and the first bridge passing the scale office going towards Rutherford. The receiving track extends beyond this bridge.

Mr. Hull had been given a time-table of the Western Maryland Railway. Our train at the time of Hull's death was on the tracks of what is known as the Lebanon Valley; that is, the time-tables subdivide the different divisions. My train at the time of the accident was on a part of the tracks of the Philadelphia & Reading Railroad, and the following rule from the Western Maryland Railway Company's time-table applies: "Trains on P. R. R. tracks, York Yard, will be governed by P. R. R. (Baltimore Division) time-tables and rules. Trains on P. & R. tracks, Gettysburg and Shippensburg, will be governed by P. & R. time-tables and rules." My train was on the Shippensburg part.

Cross-examination:

The plat shown me, as far as I know, is correct. After the coupling was made on my train I looked toward the east, and Mr. Hull and myself got on the receiving track and started to walk towards Hagerstown. While we were walking up there I did not look back the second time to see if a train or engine was coming—not after I got on the track. I don't think Mr. Hull looked back. I wouldn't say positively. I hardly think he would. The engine that struck Mr. Hull and me was running—engine and tender—was running backward. My engine was headed towards Hagerstown.

Redirect examination:

I cannot state as a fact that Mr. Hull didn't look back.

FRED L. POOLE, called on behalf of the plaintiff, testified as follows:

I was a member of the crew of which Mr. Warner was conductor. I was employed on that train as rear flagman. I recall the
21 night John Hull was killed. The train had started that night out of the Rutherford Yards. It stopped at the Harrisburg Yards, and I got off and ran back to flag—that is, to stop anything coming in on the same track my train was standing on, which was the westbound track. While I was flagging an engine approached our train on the westbound track. I signaled it to stop and it stopped. When it stopped it was on the westbound main track. I presume about ten minutes afterward it backed up and down to the Rutherford track. He backed up on to the receiving track. I did not talk to the engineer or anybody on that train. This engine came towards Hagerstown from the direction of Rutherford. About fifteen or twenty minutes after the train started on the receiving track I heard of Hull's death. I was on the extreme rear of my train and didn't know anything about the accident until somebody told me.

Cross-examination:

I was on the Rutherford side of the 13th street bridge. My train extended over the 13th street bridge. The engine spoken about came down and did not have to cross the 13th street bridge. He came down from the Rutherford Yard. He crossed over to the Rutherford track before he got to the bridge. There is a track on the right-hand side coming from Rutherford. The receiving track extends east of the 13th street bridge, but how far I don't exactly know.

MARK ARTZ, called on behalf of the plaintiff, testified as follows:

I was a member of the crew of the train on which Mr. Warner was conductor. I was running extra. I am now located at Atlanta, Georgia. I remember the night that Hull was killed. I was the front brakeman. At the time of his death I was standing between the engine and the tender of our train. I do not know the name of our engineer. They were all strange to me. I knew Mr. Warner, Mr. Poole and Hull. This was my second trip over there—a trial trip and this was the first pay trip. As I was standing between the tender and the engine on the right hand side headed towards Hagerstown, I looked to the east along my train. The first time I
22 looked I saw two little white lights. I thought probably they were switch lights, because I didn't know much about that place, and then I saw Warner and Hull walking down the middle of the track, and I turned around to speak to the engineer, and I saw that the lights were closer, and I halloaed once or twice. When I first looked down I saw the two white lights which I thought were switch

lights and at the same time saw Warner and Hull. I was able to see them because both of them were carrying lanterns. They were probably about six car lengths away from our engine when I saw them. When I looked again I noticed that the two white lights that I thought were switch lights were two or two and one-half car lengths away. Then I knew what it was. I had my lantern in my left hand and there is a little iron that sticks up and I had hold of it, and I reached out as far as I could and swung the lantern out as far as I could and halloaed. I was standing on the engine between the engine and the tender and hung out as far as I could. The other track was right opposite our engine. Both tracks were right there. I don't know the exact distance apart. It was the regular distance of the track where there is a double track. I swung the lantern out. I leaned out as far as I could. Hull and Warner were about five or six cars away from our tender and the engine was about two cars away the second time I looked, the time I swung the lantern. They were about six car lengths away from our engine and the other engine was about two car lengths behind them. I was standing right between the tender and the engine, and the engineer of my engine was sitting on his box. The two engines were about six car lengths apart. When I swung my lantern the engine was about six car lengths away from me, and Mr. Warner and Mr. Hull were between that engine and ours. A train was going up on the other side. The engine had passed and the cars don't make much noise. I don't know whether or not I halloaed loud enough for the train coming down to hear. Probably if the engineer had had his head out of the window looking to see if he could see anything, he could have heard me halloa. I was swinging the lantern for whoever could see it. I thought he was looking out of the engine window, and I swung it for them to stop their engine. The engine did not stop in response to my signal, but approached and hit the conductor and Hull. Just as it hit them both of their lights went out. The bell of that approaching engine was not ringing. It did not sound its whistle. The tender of their engine came to about the edge of our tender before it stopped. The bell of that engine did not ring at any time.

23 Cross-examination:

This was my first pay trip and my second trip to Rutherford. After this accident I gave a statement to a man up there in the office. I guess probably if my name is there I signed it. I don't know. I think probably I said something about giving a signal. I am pretty sure I did. I can't remember a small thing like that a year. I surely am positive now that I did give the signal. I stood in between the engine and the coal tender and I had hold of that little iron with my right hand and swung my lantern with my left hand (indicating). I was facing toward their engine, and had my right hand holding that iron. I would be facing toward Rutherford on our engine. Their engine was coming toward Hagerstown.

I halloaed to the fellows, thinking Warner and Hull could hear. They were about four or five car lengths from our engine. They were about four or five car lengths from the end of our tender. Our tender is about half as long as a car. I do not know about how many feet. All of the cars are not the same length. These car lengths we are talking about are between 36 and 40 feet. When I say a car length I mean between 36 and 40 feet. Some are longer and some are shorter. I do not know how long the tender is on a Western Maryland engine; I never paid that much attention. Mr. Warner and Mr. Hull were probably 180 feet away when I gave the signal, and the engine that was backing was about the length of one and a half or two cars from them. I will say 50 or 60 feet. I mean by a car length 37½ for each car. Mr. Warner and Mr. Hull were about 150 feet from our engine, and they were about a car length and a half from the engine which struck them when I gave them the signal. I guess that it was in and about 56 feet from Mr. Warner and Mr. Hull to the engine which struck them when I gave the signal. I was just looking to see where the conductor and brakeman were; how soon they were going to start.

The eastbound freight train was going on the eastbound track next to our train, but the engine had passed. It was going real slow. I don't know much about speed. I did not hear any steam exhaust. There was none when the engine was up the track. The engine had gone past a few minutes. I cannot tell whether there was a pusher engine on that train. Before the rear of the train came up I
24 was up where Hull was. I don't think I heard any bell ringing on this eastbound freight train. I wasn't listening and I couldn't say whether there was one or not.

I was listening whether there was a bell ringing on the backing engine, and there wasn't any bell ringing. I was listening when the engine was coming. If it was ringing I would have heard it when they stopped at our engine.

Q. When did you first start to listen whether there was a bell ringing on that engine or not?

A. When I first knew what it was; I thought possibly it was two switch lights.

Q. As soon as you saw that engine to know what it was you started to listen whether or not a bell was ringing?

A. If it had been ringing, I would have heard it.

Q. Didn't you say you started to listen as soon as you knew it was an engine?

A. Just depends upon how close.

Q. As soon as you knew it was an engine you started to listen to see whether the bell was ringing?

A. Probably I didn't listen when it was up the track; when it got down, when I knew what the trouble was, I was listening for the bell to ring.

Q. Then you didn't listen as soon as you knew it was a train coming?

A. As soon as I knew who it was run over, what the trouble was, then I listened.

Q. As soon as you knew what the trouble was; then you didn't listen before that. You said awhile ago that you did listen as the train was coming?

A. As soon as I knew what the trouble was.

Redirect examination:

I was standing looking at the train and saw that it was backing towards Warner and Hull and I was trying to get the attention of the man in control of the engine. While I was doing that I did not see anything that the engine was doing to give Warner and Hull notice that it was coming.

HENRY H. KRAFT, called on behalf of the plaintiff, testified as follows:

I was the engineer of the train on which Mr. Warner was conductor. I did not know of the accident to Hull until after it was over. I did not see Hull until afterwards. The tank of the engine that ran over Hull stopped opposite the tank of our engine. I was on my engine when the accident happened. After the accident was over I went back to where the body of Hull was. It was lying fifteen feet east of the front end of the engine. The body was toward Rutherford. I do not know whether or not Artz gave any signal by the waving of his lantern. I was working at the lubricator of my own engine at the time of the accident.

Before I ran over the lines of the defendant railway I was examined by the P. & R. Railway Company by their Mr. Davis and Mr. Farrel. They were examiners of the P. & R. Railway I suppose. I was examined in Harrisburg at the office of the Road Foreman of Engines of the P. & R. I only suppose it was the office of the Philadelphia and Reading Railway; it had a sign on the front of the building—Philadelphia & Reading and a sign on the door stating whose office it was.

I have been an engineer for six years and in the employ of the Western Maryland twelve years this last time. I am not familiar with the kind of engine that ran over Hull. I cannot describe it and I am not familiar with the working conditions of it. I know something about the engine—size and weight. If that engine were going five or six miles an hour it could be reasonably stopped in five or six feet. I heard the testimony of Mr. Artz as to the position of the engine when he gave the signal. I don't think it possible for the engineer of the locomotive approaching on the receiving track to have seen that signal if he had been keeping a lookout, but possibly the fireman could have. The track at this point is on a curve. Those engines have the cab about midway on the boiler and the engineer can see everything a little distance beyond the tank on that class of engine. At the point about where the engine was controlled at the time the signal was given there is a right good curve. There

is no point in four or five or five and a half car lengths in front of a backing engine and tender that either the fireman or the engineer cannot see.

Cross-examination:

I mean by a point, a point anywhere. It is possible to see from either side of an engine from one point or another. It isn't possible for both the engineer and fireman both at the same time, but
26 possible for either one to see at one time or another in any direction. A night like this was they could see north of the track as far as his eyes would permit him to see. I don't know the condition of his eyes. It was possible for either the fireman or the engineer to see at a point four or five car lengths away from the engine. They could see on an engine such as this was. If they were six car lengths away they could see an object about six feet to the side of the track—a man waving a lantern. You could see a lantern thirty car lengths; I don't think he could see it better 30 car lengths than six that close to the track. The cab of the engine would obstruct the view for the engineer six car lengths away within six feet from the side of the rail, but it wouldn't for the fireman as the track was on a curve leaning to his side. The fireman was on the other side of the engine from where Mr. Artz was. He would see him from the opposite side. I didn't see Mr. Artz give a signal or hear him halloa. I was about an arm's length away.

Redirect examination:

The safety valves of my engine at that time were out and made considerable noise.

Recross-examination:

A freight train going about six miles an hour was passing going eastward. It was not making any unusual noise. It was a heavy freight train—a tonnage train. An engine is about the only part that makes any noise. The cars make very little noise at that speed. I don't remember the condition of the weather.

Before the trial of this case notice was given to the defendant to produce the contract or agreement, if any there be, between the defendant and the Western Maryland Railway Company, under and by which John M. Hull, deceased, was working on the defendant's railroad at the time he received the injuries which resulted in his death, in response to which notice the counsel for defendant hands counsel for plaintiff a typewritten paper with the statement that that is a copy of the agreement which the defendant was notified to produce.

(Agreement is offered and read to jury):

27 *Memorandum of Agreement, Between Philadelphia and Reading Railway Company and Western Maryland Railroad Company and B. F. Bush, Receiver.*

The following regulations to govern through freight engine service between Rutherford and Hagerstown in each direction are hereby agreed to between Philadelphia and Reading Railway Company and Western Maryland Railroad Company, and B. F. Bush, receiver:

1. For the purpose of this agreement, the distance between Madison street crossing, Hagerstown, and Rutherford to be eighty-one (81) miles; the Western Maryland distance from Madison street crossing to Lurgan to be thirty-four (34) miles, and the Philadelphia and Reading distance from Lurgan to Rutherford to be forty-seven (47) miles, making the proportions as follows:

Western Maryland.....42%
Philadelphia and Reading.....58%

2. Freight trains to run through between Hagerstown and Rutherford in both directions and each Company agrees to supply motive power in the above proportions so as to equalize the service performed.

3. All engines so employed to be as nearly the same class or capacity as practicable, and to be maintained in a thoroughly efficient condition so as to insure prompt and uniform service.

4. Crews of each road to run through with their engines over the line of the other Company.

5. Each Company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour:

P. & R.—1-8 engines $6.00 per hour (slow freight).
P. & R.—1-7, L-5, L-7, L-8 engines $5.00 per hour (slow freight).
W. M.—600 series engines $5.75 per hour (slow freight).
W. M.—100 & 400 series engines $4.75 per hour (slow freight).

28 Two Dollars ($2.00) per hour to be added to each of above for fast freight service. Time to begin at Rutherford and Hagerstown when crew is called for. The time of eastbound trains to be charged against Philadelphia and Reading Railway Company on arrival at Telegraph Office, Lurgan, as shown on train register, and against the Western Maryland Railroad Company on westbound, on arrival at Telegraph Office, Lurgan, as shown on train register.

Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown.

In case of total disability of an engine of one Company upon the tracks of the other, due to mechanical defect, the engine hours shall cease at the time of such disability.

In case of partial disability from same cause, the engine hours shall be reduced in direct proportion as the decreased tonnage compares with full tonnage rating.

6. The division of earnings of the traffic not to be disturbed or in any way affected by this arrangement.

7. Each Company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

8. No charge shall be made for water and terminal facilities.

9. Neither Company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

10. Each Company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

11. The Philadelphia and Reading to accept trains or cars inspected at Hagerstown by the Western Maryland, and the Western Maryland to accept trains or cars inspected at Rutherford by the Philadelphia and Reading.

It is understood and agreed that the delivering road shall pay cost of transfer of loaded cars when transfer is made account
29 of car or lading exceeding clearance of receiving line, or when tranfer is made by reason of car being overloaded.

12. The local business of each road, including the consolidating of less-than-carload through business at Shippensburg, to be handled as at present.

13. Each Company to do the yard regulating at its point.

14. The normal position of switch at Lurgan (New Junction west of Shippenburg) will be for the through service, so that only Western Maryland local trains need stop there.

15. The repairs of engines of either Company at the shop of the other to be charged for at actual cost plus ten per cent.

16. Each Company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs.

17. Each Company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines.

18. All cases of violation of rules or other derelictions by the employees of one Company while upon the road of the other shall be promptly investigated by the owning Company, and the result reported to the employing Company, with or without suggestions for disciplining, the employing Company to report to the other the action taken.

19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one Company is operating upon the road of the other, a copy must be sent to the proper officer of each Company.

20. Employees of each Company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one Company to the other in all such matters.

21. The employees of each Company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company.

22. The Western Maryland Railroad Company to provide the necessary cars for fill-outs at Lurgan for all eastbound trains.

23. This arrangement to take effect May 1st, 1909, and to continue in force until either party has given to the other thirty (30) days' notice of a desire to terminate the arrangement.

PHILADELPHIA & READING
RAILWAY COMPANY,
By A. T. DICE,
General Superintendent.

Witness:
LEO BADER.

WESTERN MARYLAND RAILROAD
COMPANY,
B. F. BUSH,
Receiver,
By A. ROBERTSON,
General Manager.

Witness:
W. T. STENNYM.

(By Counsel for Plaintiff:) We offer to prove by Mr. Harry Hughes, who is in the employ of the Auditing Department of the Western Maryland Railway Company, that the freight earned by the train on which the deceased was working, and while running over the tracks of the defendant, was received by the defendant and earned for it.

(By Counsel for Defendant:) We object to it, for the reason that that is covered by the agreement between the two Companies, and, further, it is irrelevant in this case; and also for the further reason that under the interstate commerce act all railroads are required to take freight from other roads, and the freight is always divided according to the mileage of the roads, which Mr. Wagaman will admit Mr. Hughes would also testify to if he were here.

(By Counsel for Plaintiff:) For the purpose of showing that the Western Maryland is not the lessee of the tracks of the P. & R., and the other purpose for which it is offered, that the hauling of the train was the work of the P. & R.

31 (By Counsel for Defendant:) We think the agreement ought to be the evidence of what the arrangements between the companies was, or whether or not the Western Maryland is the lessee.

MRS. ELIZABETH HULL, the plaintiff, called on behalf of the plaintiff, testified as follows:

I live in the town of Clearspring and was 47 years of age on the 16th of last March. I was named by the Orphans' Court as administratrix of my son, John M. Hull. My family at home is composed of two young boys, who go to shool in Clearspring. My husband is

dead. John M. Hull was single. He would have been 22 years of age the 30th of last May. I own my own home, which is worth about $500.00. I gave that for it. My husband has been dead 14 years. My son John, the one that was killed in this accident, supported me during the last four years, during which time he has been living at home. He started to board away from home when he came to Hagerstown to work on the Western Maryland. My son has been contributing a part of his earnings to my support since he arrived at the age of 21. My son began to work for the Western Maryland September 6, 1916. He gave me a part of all of his earnings after he started to work for the Western Maryland Railway Company up until the time of his death. He worked every month from the time he started to work for the Western Maryland up until the time of his death except two weeks in February when he was home sick. He had a tooth pulled and it formed an abscess. I do not know how much he gave me as a whole during the time from when he started to work for the Western Maryland and the time he died. I didn't put it down all the time. He would give me $40 at a time and give me that amount every month anyway. Some months he gave me more than that. Before he went to work for the Western Maryland Railway Company, but after he was 21 years of age, he contributed to my support. He was working for Mr. Bester for about six weeks before he went to work for the Western Maryland. He contributed toward my support during that time. My son gave me a part of all his earnings from the time he was 21 years old until he was killed. The condition of my son's health at the time of his death was good. His treatment of me was very good. My health is good and has always been good.

32 Cross-examination:

I have five children living. Their names and ages are as follows: Gilbert P. Hull, aged 28 years, this month, married; he is at Atlanta, Georgia, being trained for a soldier. Before he went there he lived separately from me. The next one is David Henry Hull. He will be 26 the 13th of this April coming, and is married and lives about two miles from Williamsport. The next was my boy that was killed. The next one, Bessie G. Hull, unmarried. She will be 20 the 24th of this March. She works for Mrs. Foster in Clearspring, and the others are the boys at home, who are twins. They were 16 the 20th of October. They go to school in Clearspring. They have never earned anything towards my support. They don't earn enough to keep themselves. They never gave me any money from their earnings. Willie, one of the twins, works for Mrs. Spigler night and morning and gets $1.00 a week. He gets clothes with his money. The other one works for Mr. —— in Clearspring the same way. He has only been working there a short while, and he has to see what he can make at it before he charges any wages. In the summer he drives for Mr. Schnebley and would get 10 cents to go out to the station and back. He wouldn't go every day, just when

he had freight to haul. Some weeks he would get 60 cents. Sometimes more and sometimes less. I don't handle the money of these two boys. They handle their own money. They buy their clothes out of the money, and if that isn't enough I help. I will have owned my own home three years this February. I do not own any other property. I got $750.00 from the Relief Department of the Western Maryland. I have no property, with the exception of my home. No notes, bonds, securities or mortgages. I have about $600.00 in bank. I know Mr. Saul. He came to see me. I told him that my son gave me $50.00 and $10.00 for a Christmas gift. He was in such a hurry, and I told him the best I knew how.

Redirect examination:

At the time of the death of my son there was a mortgage on my property, which I paid off with a part of the relief money that I got from the Western Maryland. The money that I have in bank is also a part of that money. When I told Mr. Saul that my son had given me $50 at one certain time and $10 for a Christmas
33 present, I did not mean that that was all that my son had contributed to my support. I didn't tell Mr. Saul that after my son gave me $10 for a Christmas present, that he didn't contribute anything after that. He came when I was away at work and the boys came after me, and I didn't know he was coming and wasn't prepared to meet him. When he introduced himself and told me he was working for the Philadelphia & Reading, and what I told him about the $50 and the $10 was the best that I could remember. He was in such a hurry. He wanted to catch the train, and I didn't have time to think. I don't remember that I told him that the $10 that my son had given me for a Christmas present was the last money that he had given me.

Re-redirect examination:

I told him about his getting sick in February, and he didn't have his pay then, but sent it afterward. I couldn't just tell you the date. I don't remember that.

CHARLES ALVORD, called on behalf of the plaintiff, testified as follows:

I am a representative of the Prudential Insurance Company, and have been engaged in the insurance business 18 years this April, since 1900. The Mortuary Rate Book of Instructions to Agents as handed me by the counsel purports to give the American Experience Table of Mortality. That table is accepted as the standard table of mortality by the insurance companies, and also by publishers of insurance rates, such as the Handy Guide and Little Gems that are authorities on insurance rates, that refer to the American Table as the standard table taken. The expectation of life as shown by

that table of a person in good health 47 years of age is 23.08 years. That table is applicable to both men and women. The expectancy of a man 22 years of age in good health is 40.85 years.

Professor CHARLES F. DRYDEN, called on behalf of the plaintiff, testified as follows:

34 Direct examination:

I am the County Superintendent of Schools for Washington County and have been engaged as an educator for 24 years. "Butler's Graded Problems" is accepted as a standard book on arithmetic. I never heard its accuracy questioned. Part 24 of that book shows the present worth of an annuity of $1.00 for any number of years to 25. I think that table should be correct. I would accept it as such. As far as I know it is generally accepted as correct. I have never heard it questioned. From that table the present worth of an annuity of $1.00 for 23 years, counting money worth 3 per cent, is $16.44; at 4 per cent, $14.85; at 5 per cent, $13.48. The method of calculation for any sum in excess of $1.00 per year would be to get the number of times the annuities, or to find the amount of the annuity times the years you have given.

Cross-examination:

The present worth of an annuity of $1.00 for 23 years, counting money at 6 per cent, is $12.30.

HENRY H. KRAFT, recalled on behalf of the plaintiff, testified as follows:

Direct examination:

To the best of my judgment I have been running on the tracks of the defendant railroad nearly 3 years. I know of instances where other crews on other occasions originating on the Western Maryland tracks, having taken trains to Rutherford, have been sent out by the P. & R. over its lines.

Q. State what you do know on that subject?

To the asking of which question and the answering thereof the defendant objected. But the Court sustained the said objection of the defendant, and refused to allow the said question to be put or to be answered by said witness; whereupon the plaintiff, through its counsel, excepted to said action of the Court in refusing to allow said question to be put or answered, and requested the Court to sign this her First Bill of Exceptions, which is accordingly done this 3rd day of January, 1918.

M. L. KEEDY.

35 After offering the evidence set out in the aforegoing Bill of Exceptions, which is hereby made a part hereof as fully as if they were here incorporated, the plaintiff produced the following

evidence, to wit: The following rules of the defendant railway company as they appear in the Book of Rules of the defendant railway company marked "20064," identified by the witness Warner as the rules governing employees of the defendant company:

Rule 974—Under the heading "Enginemen": "They must keep a constant lookout; will carefully observe all signals, and see whether other trains are carrying signals."

Rule 997—Under the heading "Rules for Firemen": While engine is moving they must keep a constant lookout when not engaged in firing and be on watch if the engineman is obliged to look away from the track in front, until he can resume his lookout; they will give instant notice to the engineman of any signals or indication of danger or obstructions, or if there is any reason to believe the train has parted, or has struck any person or object on the track."

Rule 1001—Under the heading "Rules for Conductors": "They will have general charge of the train and of all men employed on the train while on the road."

Rule 1084—Under the heading "Rules for Freight Brakemen": "Freight brakemen report to and receive instructions from the train master. They will obey the orders of the conductor and, at terminal stations, those of the station agent or yard master."

Rule 106—Under the heading "Movement of Trains": "In all cases of doubt or uncertainty the safe course must be taken and no risks run."

Rule 12 (*a*)—"Hand, Flag and Lamp Signals": Manner of Using—(*a*) Swung across the track. Indications—Stop.

(Whereupon the plaintiff rested.)

Whereupon the defendant offered the following prayer:

Defendant's First Prayer.

The defendant prays the Court to instruct the jury that, under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant.

And the plaintiff objected to the granting of the defendant's said prayer, but the Court overruled the said objection and granted the same; to which action of the Court in granting said prayer the plaintiff then and there excepted and prays the Court to sign this her Second Bill of Exceptions, which is accordingly done this 3rd day of January, 1918.

M. L. KEEDY.

Examined and found correct—Jan. 3, 1918.

KEEDY & LANE.

Dec. 14, 1917.—Trial by Jury and Verdict for Defendant.

Dec. 16, 1917.—Judgment on Verdict in favor of the Defendant for Costs.

Order for Appeal.

(Filed Dec. 29th, 1917.)

In the Circuit Court for Washington County—No. 90 Trials—November Term, 1917.

ELIZABETH HULL, Administratrix,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY.

Mr. Oswald, Clerk:

You will please enter an appeal to the Court of Appeals of Maryland from the judgment entered in the above entitled cause.

OMER T. KAYLOR,
FRANK G. WAGAMAN,
Attorneys for Plaintiff.

37 & 38 *Docket Entries.*

Action, Case; Titling and Narr. filed; Summons issued & Copy of Summons & Narr. made to be served; Summoned by Service on W. Md. Ry. Co., a corporation, its agent, by service on C. Harvey Koontz, Agt. W. Md. Ry. Co., & Summoned defdt. by serviec on C. Harvey Koontz, the defdt.'s ticket agent & person in service of Defdt, & copies of process and narr. left in hands of each. Summoned Defdt. by service upon Elmer P. Bachtel, Defdt.'s Agent & person in service of Defdts., & Copies of Narr. & Process left in his hands; Summoned by service upon Daniel Willard, Director, & copy of process & Narr. left in his hands. Defdt.'s pro. perl. apps. entered by order of Court; Rule Plea. Pleas filed Oct. 18, 1917; copy mode; Affidt. for continuance filed Dec. 12, 1917; Motion & Leave to Amend Declaration by adding a 3rd Count, Dec. 12, 1917; 3rd Count filed Dec. 12, 1917; Demurrer to 3rd Count; Demurrer overruled Dec. 12, 1917; Pleas filed Dec. 12, 1917; Issue joined on 1st Plea & 2nd Plea traversed Dec. 12, 1917; Issue joined on traverse Dec. 12, 1917.

Trial by Jury and Verdict for Defendant, Dec. 14th, 1917; Time for filing Bill of Exceptions extended to Feby. 10, 1918, filed Dec. 14, 1917.

Judgment on Verdict in favor of the Defendant for Costs, Dec. 16. 1917.

Order for Appeal filed Dec. 29. 1917.

Plaintiff's Attorneys: F. G. Wagaman, Omer T. Kaylor.

Defendant's Attorneys: H. H. Keedy, Jr., Charles C. Keedy.

STATE OF MARYLAND,
Washington County, To wit:

I, Edward Oswald, Clerk of the Circuit Court for Washington County, do hereby certify that the aforegoing is truly taken from the record of proceedings in the aforegoing case.

In testimony whereof I have hereunto set my hand and affixed the seal of the Circuit Court for Washington County, at Hagerstown, this the 4th day of January, A. D. 1918.

[SEAL.] EDWARD OSWALD,
Clerk of the Circuit Court for Washington County.

Copy Opinion of the Court.

Court of Appeals of Maryland, January Term, 1918.

ELIZABETH HULL, Administratrix,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY.

Chief Judge Boyd delivered the opinion of the Court.

This is an appeal from a judgment rendered in favor of the defendant (appellee) in a suit brought by the appellant under the Federal Employers' Liability Act to recover for loss sustained by reason of the death of John M. Hull in Harrisburg, Pa. There are three counts in the declaration, all of which allege that John M. Hull, the son of Elizabeth Hull, the plaintiff, was at the time of the injuries and death complained of, and for some time prior thereto had been a servant and employee of the defendant, and was employed and engaged in the performance of his duties in interstate commerce. The alleged negligence relied on is stated differently in the three counts, but it is only necessary to say that the declaration is sufficient to bring the case within the Federal Employers' Liability Act, if the facts sustained it. The defendant filed the general issue plea and one alleging that John M. Hull was not on or about the 17th of March, 1917, or at any other time, a servant or employee of the defendant. At the conclusion of the testimony offered by the plaintiff the defendant offered a prayer that "under the pleadings in this case there is no evidence legally sufficient to entitle the plaintiff to recover and their verdict must be for the defendant". That was granted and a verdict was rendered accordingly, upon which the judgment appealed from was entered.

Mr. Hull belonged to a crew employed by the Western Maryland Railway Company and was freight brakeman. The day before the accident the crew had taken a train, hauled by a Western Maryland engine and operated by Western Maryland employees from Hagerstown, Md., to Rutherford, Pa., and when he was killed the same crew was engaged in taking a train from Rutherford to Hagerstown. The Western Maryland road extends from Hagerstown, Md., to Lurgan, Pa., and the defendant's road from Lurgan to Rutherford, and for the purpose of operating trains from Hagerstown to Rutherford and back the two roads entered into an agreement which will be referred to later.

We will first consider the question suggested by the special plea—whether Hull was an employee of the defendant within the meaning of the Federal Employers' Liability Act. There can be no doubt about his being engaged in interstate commerce. Robert A. Warner, conductor of the train, testified that they had taken a train from Hagerstown to Rutherford—arriving at the latter place some time the day before, and were called about 12.15 A. M. on the 17th of March by the yard-master of the Rutherford yard of the defendant company. He directed them to get a train of cars off the west bound yard

and pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg on the west-bound main track, on which track their train was standing when they stopped for the seven cars, which they added to their train. The yardmaster at the Rutherford yard gave him instructions as to the operations connected with the movement of the train. The Philadelphia & Reading supplied the person to take the place of Hull as a member of the crew after he was killed. The witness said that his instructions were that when on the line of the Philadelphia & Reading he should obey the rules and instructions of that company.

The Federal Employers' Liability Act provides: "That every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representatives for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier", etc. There have already been a large number of decisions on various questions which have arisen under Employers' Liability Acts in the State and Federal Courts, but it is rather remarkable that there are not more directly bearing upon the question we have before us.

One of the principal cases relied on by the appellant is North Carolina Railroad Company vs. Zachary, 232 U. S. 248, Ann. Cas. 1914 C., 159. In that case it was shown that the North Carolina Railroad Company was not an interstate railroad—its tracks and property lying wholly within the State—but it had leased its road to the Southern Railway Company, which is an interstate railway, and a fireman employed by the latter company in interstate commerce was killed on the road of the lessor by the alleged negligence of the lessee. Justice Pitney said in the early part of his opinion that, "Under the local law as laid down in Logan vs. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation can not evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee, injured through the negligence of the latter". After referring to the decision of the lower Court in 156 N. C. 500, 72 S. E. 858, he said, "It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is that, although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employees as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the

lessor is a 'common carrier by railroad engaging in commerce between the States' and that the deceased was 'employed by such carrier in such commerce' within the meaning of the Federal Act; provided, of course, he was employed by the lessee, in such commerce at the time he was killed".

In the case of Southern Ry. Co. vs. Lloyd, 239 U. S. 496, an engineer in the general employ of the Southern Railway Co., was injured on the road of the North Carolina Railway Co., being the same company mentioned in the Zachary case, and the relation was the same between the two companies as in that. The plaintiff sued and recovered judgment against both Companies, which was affirmed by the Supreme Court of the State and later by the Supreme Court of the United States—citing the Zachary case as the authority for it.

We quoted at length from the Zachary case because the appellant relied so strongly on it, and, being decided by the Supreme Court of the United States, it is necessary to ascertain whether it is applicable to this case. After giving it our most careful consideration we have reached the conclusion that it is not. Justice Pitney shows clearly that the decision is based on the local law of North Carolina, as announced by the Supreme Court of that State, which makes a lessor railway company responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road, as is seen by the quotations we have made. He said what the Act clearly declares, that in order to bring the case within the terms of the Federal Act, "defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce". As the North Carolina R. R. Co. had made the lease without being authorized by a statute expressly exempting it, it could not escape its responsibility under the rule adopted in that State, and Justice Pitney said, as shown above, that the lease "constitutes the lessee the lessor's *substitute or agent*, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible" (italics ours). No such relation exists between these two railroad companies. There was no lease, and the appellee had not turned over its charter duties to the Western Maryland Ry. Co. It was still in the discharge of those duties, but the two companies by agreement used each other's tracks in the performance of their duties in certain interstate commerce.

It is not unusual for two railroad companies to make such, or similar arrangements. Sometimes there is the relation of lessor and lessee, and, without citing the cases in the notes, it will be seen by reference to 33 Cyc. 703-707, that the Courts are not altogether in harmony in reference to some matters arising when that relation exists. Then there are a number of cases which have arisen when one company has permitted the use of its road by another, ibid 710, and still others, where companies were operating or using roads of others, ibid, 713. When we are called upon to ascertain whether a person is a servant or employee of another, sometimes the question arises as to whether, although he is a general servant of one master, he has become the servant of another, in some particular employment. See 26 Cyc. 1285, where the effect of the servant of one master being under the control of another is considered, but on the next page of that

volume it is said: "The fact that one railroad company uses the track and stations of another under contract between them does not as a rule make the employees of either company fellow-servants with the employees of the other". It is undoubtedly true that two railroad companies operating under such a contract as the one in this case bear a very different relation to each other from those operating under a lease, where one has practically turned over the operations of its road to the other.

Hull was unquestionably an employee of the Western Maryland Railway Company, and not of the appellee, until he reached Lurgan on his trip the day before he was killed, and would have been as soon as he reached Lurgan on the return trip, had he not been killed. To hold that he had ceased to be an employee of the Western Maryland and had become one of the appellee from the time he reached Lurgan would be contrary to what is generally understood by the term "employee", and would unquestionably be contrary to the spirit, if not the letter, of the agreement between the two companies, which was offered in evidence by the appellant. There is not the slightest suggestion in that agreement that the crew of one company was to be regarded as the crew of the other, while on the latter's line. We will refer to such part of the agreement as we deem material.

Paragraph 2 is as follows: "Freight trains to run through between Hagerstown and Rutherford in both directions and each company agrees to supply motive power in the above proportions so as to equalize the service performed."

Paragraph 4 provides that, "Crews of each road to run through with their engines over the line of the other company."

Paragraph 5 provides in part that, each company to compensate the other for the use of the other's engines and crews on their line at the rates per hour set out. Time to begin at Rutherford and Hagerstown when crew is called for.

Paragraphs 6, 7, 8, 9 and 10 are as follows:

"6. The division of earnings of traffic not to be disturbed or in any way affected by this arrangement.

7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

8. No charge shall be made for water and terminal facilities.

9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road".

Paragraphs 16 to 21, inclusive, are as follows:

"16. Each company to relieve and return as promptly as practicable the engines and crews of the other at ends of runs.

17. Each company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its line.

18. All cases of violation of rules or other derelictions by the employees of one company while upon the road of the other shall be promptly investigated by the owning company, and the result reported to the employing company, with or without suggestions for dis-

ciplining, the employing company to report to the other the action taken.

19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

20. The employees of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest cooperation to be given by the one company to the other in all such matters.

21. The employees of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning company".

There would seem to be no doubt that the provisions of the contract referred to above show that the two companies did not intend to make the regular employees of the one company the employees of the other, when on the latter's line—on the contrary it is apparent that they intended the very opposite. The appellant relies on paragraph 10, but there is nothing in that to show that the employees of the other company are to be regarded as employees of the owning company. The appellee would undoubtedly be responsible to an employee of the Western Maryland Railway Company for injuries sustained by reason of the negligence of the appellee's employees or agents, but not under the Federal Employers' Liability Act. Suppose that Act had not been passed before this accident, could it have been success-ully contended that the appellee was not responsible for the death of Hull because its employees were his fellow servants? That would have extended the fellow-servant doctrine very far, and certainly beyond what had been done in this State. In P. W. & B. R. R. Co. v. State, use Bitzer, 58 Md. 372, 400, that company the B. & O. R. R. Co., and other railroad companies had an agreement with reference to the use of the defendant's road in Baltimore. There was an agreement between the companies in that case. This Court said: "Whatever effect this agreement might have upon the parties to it, it could not have any upon strangers to it, nor alter nor change the relations of either of them towards third parties, nor have the effect of making those, who were employed and paid wages by either of the contracting parties, the co-employees of the agents and workmen of the other parties, nor make the others liable, either severally or jointly, for any loss or damage caused by the neglect of any one of them, even had the agreement been silent in this respect. But in order to guard against any such result, the agreement itself expressly provides, that 'if an accident shall happen whereby damages to persons or property shall be incurred, the party on whose road the same shall happen shall alone be responsible' ". It will be observed that paragraph 10 is not a new provision in such agreements. The opinion went on to say in reference to the principle that every employee assumes the risk of the negligence of his co-employees. "Samuel Bitzer was not employed or paid by the appellant, but was employed by the Baltimore and Ohio Railroad Company, and therefore this principle is not applicable to him". That case settled the question for this State, that the employees of the several railroad companies could not, in working under such an agreement, be considered co-em-

ployees. One of the objects of this Act, as explained by Senat Doliver on the floor of the Senate, was to modify the old law of t negligence of co-employees. He spoke of the law in this country th an employee injured by the negligence of a fellow workman cou not recover, and said, "This bill abolishes that doctrine, and gives t employees the right to recover for injuries arising from the neg gence of his fellow workmen. That is the first proposition. T second proposition modifies the law whereby in other generatio workmen were held by the Court to assume the risk arising from d fective machinery". Thornton on the Federal Employers' Liabili and Safety Appliance Acts (2 ed.) Sec. 1. It is obvious that the was no necessity to pass the Federal Act for the benefit of the e ployees of one Company when injured by those of another Compar under such circumstances as we have in this case, so far as the d trine of fellow-servant is concerned. It would be regarded as car ing the doctrine to an unjustifiable extreme, if in a suit for the dea of Hull, brought outside of this Act, the defense of fellow-servant h been allowed. Under the language of the Federal Act there is l ground for holding the employees of the several companies to be employees, than there was in such a case as Bitzer's. The gene principle is also recognized in Bentley, Shriver & Co. vs. Edwar 100 Md. 652, although that was not a railroad case.

In the case of Robinson vs. B. & O. R. R. Co., 237 U. S. 84, R inson was a porter on a Pullman car, was required to obey the ru and regulations of the railroad company, and collected ticke-s a *fairs* from passengers coming on the train after 3 o'clock A. M. was injured by the alleged negligence of the railroad company a sued under the Federal Employers' Act. It was held that he was an employee within the meaning of that Act. Justice Hughes sa "We are of the opinion that Congress used the words 'employee' a 'employed' in the statute in their natural sense, and intended to scribe the conventional relation of employer and employee. It well known that there were on interstate trains persons engaged various services for other masters. Congress, familiar with this si ation, did not use any appropriate expression which could be tak to indicate a purpose to include such persons among those to wh the railroad company was to be liable under the Act." So it may said that Congress may have been presumed to know that such rangements as existed between these two companies were often ma and if it had intended to make the employees of the "owning co pany", as the agreement calls it, co-employees of the other compa it would have used language "to indicate a purpose to include" th

The fact that the crews of the other company were subject to rules and regulations of the owning company can not be materia determ-ing the question. That is, of course, necessary for the saf of all persons traveling on the line of the owning company, as wel all working on it. The business could not be successfully conduc on a road over which many trains ran, if the "employees of e company", to use the language of paragraph 21, while upon tracks of the other, were not subject to and required to conform the rules, regulations, discipline and orders of the owning co pany". But that would certainly not have the effect of making th employees of the owning company, any more than it would the po

on a Pullman car, or an express agent, or mail agent traveling on the train. In Oliver vs. Northern Pac. Ry. Co., 196 Fed. 432, it was held by the U. S. District Court that a porter on a Pullman car could recover under the Federal Act under the circumstances of that case, but the decision was based on the ground that he was employed by an Association composed of the railroad company and the Pullman Company, which were joint owners of 50 cars. In Mo. K. & T. Ry. vs. Blalach, 147 S. W. 559 (Texas), an agent of an express company who handled baggage, but there was no proff of employment by the railroad company, was held to be a passenger and not an employee within the meaning of the Act. See also same Company vs. West, 134 Pac. 655, to the same effect. It is the duty of the owning company to use all reasonable efforts to protect the employees of what we might call the "visiting company", and even if there was no agreement on the subject, the owning company could enforce such rules and regulations as are necessary for the protection of its own employees and property, as well as those of the other company.

We have not thought it necessary to discuss the case of Standard Oil Co. vs. Anderson, 212 U. S. 215, and other cases cited by the appellant, as we do not think they are applicable to the facts of this case. That a general servant or employee of one company may become the servant or employee of another in some special employment cannot be doubted. For convenience we cited above 28 Cyc. 1285, where many such cases are referred to. We cannot agree, however, with the appellant that when Hull was killed he was engaged in work for the appellee in the sence the authorities speak of such employment. His crew was then taking a train to their regular employer's road—one of the very things they were employed by the Western Maryland Ry. Co. to do. The distance between Hagerstown and Rutherford, as shown by the agreement, was eighty-one miles and a regular run of the crews was from Hagerstown to Rutherford and return, just as it was with the crews of the appellee from Rutherford to Hagerstown and return. But after all this case does not turn on nice distinctions as to whether a person can be said to be an employee under certain facts and not under other facts, but whether John M. Hull was an employee of the appellee within the meaning of the Federal Employers' Act. For reasons we have stated, we feel constrained to hold that he was not.

We are of the opinion, then, that under the language of the Act, under the agreement between the two companies, so far as it is binding (and the appellant put it in evidence) and under what we regard as the reasonable and practicable view of the question, as well as under such authorities as we deem applicable, we must hold that the Federal Employers' Liability Act does not apply to this case. As that conclusion must result in an affirmance of the judgment, it is unnecessary to discuss the question of negligence.

Judgment affirmed, the appellant to pay the costs.

Filed April 3rd, 1918.

Copy of Judgment.

Court of Appeals of Maryland, January Term, 191-.

Appeal from the Circuit Court for Washington County.

ELIZABETH HULL, Administratrix of John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY, a Corporation.

1918 April 3rd. Judgment Affirmed, the appellant to pay the costs.

Opinion filed. Op.

BOYD, *C. J.*

To be reported.

Appellant's Cost in the Court of Appeals of Maryland:

Record	$36.00	
Brief	.....	
Appearance Fee	10.00	
Clerk	1.30	
		$47.30

Appellee's Cost in the Court of Appeals of Maryland:

Brief	$.....	
Appearance Fee	10.00	
Clerk	1.45	
		$11.45

Test:

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

STATE OF MARYLAND, *set:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of the said State, do hereby certify that the said Court is the highest Court of Law and Equity in said State in which a decision can be had. I further certify that the aforegoing is a true transcript of record, opinion of the Court and judgment thereon in the case there stated.

In Tes-imony whereof I hereunto subscribe my name and the seal of the Court of Appeals affix, this fourteenth day of June, A. D. nineteen hundred and eighteen.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

Transcript $12.80.

51 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Being informed that there is now pending before you a suit in which Elizabeth Hull, administratrix of John M. Hull, deceased, for the benefit of Elizabeth Hull, mother of deceased, is appellant, and The Philadelphia & Reading Railway Company is appellee, No. 48, which said suit was removed into the said Court of Appeals by virtue of an appeal from the Circuit Court of Washington County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the
52 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,615. Supreme Court of the United States, No. 529, October Term, 1918. Elizabeth Hull, administratrix, etc., vs. The Philadelphia & Reading Railway Company. Writ of Certiorari.

53 In the Supreme Court of United States, Oct. Term, 1918.

ELIZABETH HULL, Administratrix John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased, Petitioner,

VS.

THE PHILADELPHIA AND READING RAILWAY COMPANY.

This stipulation and agreement made and entered into by and between Elizabeth Hull, administratrix of John M. Hull, deceased, petitioner, and the Philadelphia and Reading Railway Co., certifies that the said petitioner and the said Philadelphia and Reading Railway Co. do hereby stipulate and agree that the certified transcript of the record of said case in the Court of Appeals of Maryland and now on file in the office of the Clerk of the Supreme Court of United States shall be held and considered as the certified transcript of said record in the Court of Appeals of Maryland, returned to the

Supreme Court of United States according to the direction of a writ of certiorari issued out of said Supreme Court of United States on the 31st day of October, 1918, and directed to the Court of Appeals of the State of Maryland in the matter of the aforesaid petition, the same being No. 529, October Term, 1918, in the Supreme Court of United States; and that in the place and stead of the certified transcript of said case from the Court of Appeals of Maryland the Clerk of the Court last aforenamed shall send up as his return to the aforesaid writ with a certified copy hereof.

FRANK G. WAGAMAN,
OMER T. TAYLOR,
Attorneys for Petitioner.

HENRY H. KEEDY, JR.,
Attorneys for Philadelphia and Reading Railway Company.

Filed November 13th, 1918.

54 MARYLAND, *sct:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the aforegoing is truly taken and copied from the original stipulation now on file in the Court of Appeals of the State of Maryland in the case there stated.

In Testimony Whereof I hereto subscribe my name and the seal of the Court of Appeals of Maryland affix this thirteenth day of November, A. D. nineteen hundred and eighteen.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

55 [Endorsed:] File No. 26,615. Supreme Court U. S., October Term, 1918. Term No. 529. Elizabeth Hull, Administratrix, etc., petitioner, vs. The Philadelphia & Reading Railway Company. Writ of certiorari and return. Filed November 15, 1918.

Office Supreme Court, U. S.
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No. [redacted]151

OCTOBER TERM, 1918.

TO THE

SUPREME COURT OF THE UNITED STATES.

ELIZABETH HULL, Administratrix of John M. Hull, deceased, for the benefit of Elizabeth Hull, mother of deceased, PETITIONER,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY, a corporation, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

FRANK G. WAGAMAN,

OMER T. KAYLOR,

HARVEY R. SPESSARD,

Attorneys for Petitioner.

No. 529

OCTOBER TERM, 1918.

TO THE

SUPREME COURT OF THE UNITED STATES.

ELIZABETH HULL, Administratrix of John M. Hull, deceased, for the benefit of Elizabeth Hull, mother of deceased, PETITIONER,

vs.

THE PHILADELPHIA & READING RAILWAY COMPANY, a corporation, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

The said petitioner respectfully shows to this Court as follows:

1st: Your petitioner was at the time of the commencement of this suit, a citizen of the State of Maryland and the respondent was at that time and at the time of the injuries to your petitioner's decedent which resulted in his death and for which this suit was brought, a corporation duly organized and existing under the laws of the State of Pennsylvania.

2nd: That on the 17th day of March, 1917, and for a

long time prior thereto John M. Hull, the petitioner's decedent, was in the general employ of The Western Maryland Railway Company, a corporation duly organized under the laws of the State of Maryland.

3rd: The Western Maryland Railway Company was at the time of the injuries and death of John M. Hull for which this suit was brought, an interstate carrier by railroad, owning and operating, among other lines, a line of railway from Hagerstown, State of Maryland, to Lurgan, State of Pennsylvania. The respondent, The Philadelphia & Reading Railway Company, was at said time and now is, also an interstate carrier by railroad, owning and operating, among other lines, a line of railway from Rutherford, State of Pennsylvania, to Lurgan, State of Pennsylvania. At Lurgan, Pennsylvania, these two lines of railway have a physical connection.

4th: On the first day of May, 1909, the respondent and The Western Maryland Railway Company entered into an agreement which appears in the Record of the case in the Court of Appeals of Maryland, beginning at Page 27 thereof, and which agreement is prayed to be taken as a part of this petition, by the terms of which freight trains were "to run through between Hagerstown and Rutherford in both directions," "the crews of each road to run through with their engines over the line of the other company" and "each company to compensate the other for the use of the others engines and crew on their line" at a certain fixed rate per hour according to the size of the engine furnished by each company to the other, but "a division of earnings of the traffic not to be disturbed or in any way affected by this arrangement"; and each company to receive the freight earned by such train while such train was running on its line of railway.

This agreement further provided that "each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road," "each company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines," and "the employees of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning company."

In accordance with this agreement freight that arrived in the yards of The Western Maryland Railway Company at Hagerstown, Maryland, and was destined to Rutherford, Pennsylvania, was made up into trains by the Western Maryland Railway Company and with its engines and crew was hauled to Lurgan, Pennsylvania, as its train. This train ran on to Rutherford, Pennsylvania, as the train of the respondent but with the same engine and crew, the respondent paying to The Western Maryland Railway Company the hire for the engine and crew, at the rate per hour fixed by said agreement, from the time said train reached Lurgan, Pennsylvania, until the engine arrived on the fire track of the respondent at Rutherford. This engine and crew were subject to the orders and directions of the respondent and at such time as it desired, were sent with a train, made up in its yard at Rutherford to Lurgan and on to Hagerstown, the respondent paying The Western Maryland Railway Company for the engine and crew, the price per hour fixed by the agreement, from the time said crew was called by it at Rutherford until said engine and crew arrived at the telegraph office at Lurgan. The crew leaving Rutherford was required to add to the train as it proceeded on its way, such cars of the respondent on its line as it might direct.

5th: John M. Hull, the petitioner's decedent, was in the general employ of The Western Maryland Railway Company on the 16th day of March, 1917. With other members of his crew he worked, under this agreement, as a brakeman taking a train from Hagerstown, Maryland to Rutherford, Pennsylvania. About 12:15 A. M. on the 17th day of March, 1917, with the other members of his crew, he was directed by the yard master of the respondent at its Rutherford yard to take a train of cars from that yard to Lurgan and on to Hagerstown, Maryland. This train was made up by the respondent in its yards and contained freight and merchandise delivered to the respondent for transportation and was destined for Hagerstown, Maryland. Before leaving the Rutherford yard the crew of this train was ordered by the yard master of the respondent to pick up seven additional cars of freight from the respondent's line of railway at Harrisburg and add them to the said train. While the petitioner's decedent was so doing he was negligently killed by a locomotive of the respondent.

6th: Before the respondent permitted the enginemen and conductors to operate trains over its lines under this agreement they examined such enginemen and conductors as to their fitness and after the petitioner's decedent was killed, the respondent furnished as a brakeman to take his place, a person in its general employ.

7th: The petitioner's decedent left surviving him no widow, no children and no father, but did leave surviving him Elizabeth Hull, his mother, and the said Elizabeth Hull was dependent upon the said John M. Hull for support and maintenance and had a reasonable expectation of pecuniary benefits from the continuance of the life of the said John M. Hull.

8th: On the 20th day of August, 1917, the petitioner

filed suit in the Circuit Court for Washington County, State of Maryland, for damages on account of the death of her said decedent against this respondent and based her right of recovery upon the provisions of the Federal Employers' Liability Act. In due course the said respondent filed the general issue plea to the plaintiff's declaration, and also a special plea that the petitioner's decedent was not on or about the 17th day of March, 1917, or at any other time, a servant or employee of the respondent. Said suit came on for trial in said Court on December 12th, 1917, and at the conclusion of the petitioner's evidence as set forth in the Record of this case in the Court of Appeals of Maryland and as briefly set forth herein, the said Court directed the jury to return a verdict in favor of the respondent, upon which verdict judgment was duly entered, the said Court determining, as a matter of law, that John M. Hull at the time of the injuries which resulted in his death, was not an employee of the respondent within the meaning of the Federal Employers' Liability Act; whereupon your petitioner took an appeal to the Court of Appeals of Maryland, said last named Court being the highest Court of the State of Maryland wherein a decision of the questions involved in said case could be determined, and a certified transcript of the record and all of the proceedings in the said trial Court was duly transmitted to the said Court of Appeals of Maryland; which appeal came on to be heard and was heard by said Court at its October Term, 1917, and the said Court of Appeals of Maryland by its opinion and order filed on April 3rd, 1918, affirmed the said judgment of the said trial Court and by its opinion and order also determined, as a matter of law, that the petitioner's decedent at the time of the injuries and death sued for was not an employee of the respondent within the meaning of the Federal Employers' Liability Act.

9th: The questions and propositions of law involved in this case are substantially as follows:

(a) When one in the general employ of another is loaned or hired to a common carrier by railroad, for a special service involving actual interstate transportation, under an agreement between the common carrier by railroad and that other, by which the common carrier by railroad makes itself responsible for the acts of the one so loaned or hired, and acquires the right to control the manner of the performance of the special work, which work, is, in its doing, the work of such common carrier, does that one become an employee of the common carrier by railroad within the meaning of the Federal Employers' Liability Act?

(b) Under the facts of this case was the petitioner's decedent an employee of the respondent within the meaning of the Federal Employers' Liability Act, at the time he received the injuries which caused his death and for which this suit was brought?

10th: The petitioner contends as follows:

(a) That the conventional relation of employee and employer which is held to be within the meaning of those terms in the Federal Employers' Liability Act (Robinson vs. B. & O. R. R. Co. 237 U. S. 84) existed between the petitioner's decedent and the respondent at the time of his injuries, because, under the facts shown, the said decedent was at that time doing the work of the respondent and was also under the exclusive control and direction of the respondent in the performance of that work.

Standard Oil Co. vs. Anderson 212 U. S. 215.
Singer Manufacturing Co. vs. Rahn 132 U. S. 518.

(b) Since the charter of the respondent imposed upon it the non-delegable duty of the operation of its road (Central Railway Company vs. Pullman Company 139 U. S. 24) and the deceased at the time of his injury was performing work of carrying out that non-delegable duty, with the knowledge and assent of the respondent, the relationship of employer and employee was necessarily created thereby.

Atlantic Coast Line R. R. Co. vs. Treadway's Administratrix 120 Va. 735—93 S. E. 560.

(c) Since, by the terms of the agreement mentioned the respondent was responsible for the acts of the petitioner's decedent at the time he was injured, he was at that time, in contemplation of law, an employee of the respondent.

North Carolina Railway Company vs. Zachary 232 U. S. 248.

Southern Railway Company vs. Lloyd 239 U. S. 496.

11th: And your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons among others:

(a) Because the determination of the question as to whether or not the relation of employer and employee in any given case existed, is controlled by the principles set out in the decisions of this Court in Standard Oil Company vs. Anderson 212 U. S. 84, Singer Manufacturing Company vs. Rahn 132 U. S. 518, Chicago, R. I. & P. R. Co. vs. Bond

241 U. S. 449 and other cases in this Court and the Maryland Court of Appeals failed to apply those principles in this case.

(b) Because the petitioner's decedent was, at the time of his injuries, doing work, which, in its doing, was the work of the respondent and the respondent had the right to control the manner of its performance; from which facts arose such relation of the petitioner's decedent to the respondent as to give her the benefit of the provisions of the Federal Employers' Liability Act, which benefit was denied her by the Maryland Courts.

(c) Because under analogous facts the Supreme Court of Appeals of the State of Virginia has decided the questions of law raised in this case contrary to the decision of the Maryland Court of Appeals in this case.

(d) Because the public interests and the interest of jurisprudence require the decision of this Court upon the questions of law involved herein.

(e) Because said questions are of sufficient, general, national and material importance and interest as to make it necessary that they should be determined by the Court of last resort.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Court of Appeals of the State of Maryland to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

FRANK G. WAGAMAN,
[illegible] C. RAYNER,
HARVEY H. BUSHMAN,
Attorneys for Petitioner.

[illegible],
Administratrix.

STATE OF MARYLAND,

WASHINGTON COUNTY, to-wit:

Elizabeth Hull, Administratrix of John M. Hull, deceased, being duly sworn, says, I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is derived from the Record in this case and from what has taken place in my presence and hearing in the Court in which this action has been heard.

ELIZABETH HULL.

Sworn to before me this 20th day of June, 1918.

W. HAMPTON SHERVIN,
Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

HARVEY R. SPESSARD,
Attorney for Petitioner.

No. 151

DEC 1 1919
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ELIZABETH HULL, ADMINISTRATRIX OF JOHN M. HULL, DECEASED, FOR THE BENEFIT OF ELIZABETH HULL, MOTHER OF DECEASED,

Petitioner.

vs

THE PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION.

Defendant in Error.

BRIEF FOR PETITIONER

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In the Supreme Court of the United States.

ELIZABETH HULL, Administratrix of JOHN M. HULL, deceased, for the benefit of ELIZABETH HULL, mother of deceased, *Petitioner*

vs

THE PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation

No. 151

Oct. Term 1919

BRIEF FOR PETITIONER

STATEMENT

This case arises on a writ of certiorari in the Court of Appeals of Maryland bringing up for review a judgment of that Court which, affirming a judgment of the Circuit Court of Washington County, in the same State, held that the petitioner's decedent was not at the time of his injuries and death an employe of the respondent within the meaning of the Federal Employers' Liability Acts of April 22, 1908 (35 Stat. at L65, Chap. 149), and April 5, 1910 (36 Stat. at L291 Chap. 143).

STATEMENT OF THE CASE

At the trial of this case in the Circuit Court of Washington County, State of Maryland, the petitioner offered evidence tending to show that on the 17th day of March, 1917, and for a long time prior thereto, John M. Hull, the petitioner's decedent, was in the general employ of the Western Maryland Railway Company, a railroad corporation; that said Company was at the time of the injuries and death of the said John M. Hull, an interstate carrier by

railroad owning and operating among other lines a line of railway from Hagerstown, State of Maryland, to Lurgan, State of Pennsylvania; that the respondent, the Philadelphia and Reading Railway Company, was at said time also an interstate carrier by railroad, owning and operating among other lines a line of railway from Rutherford, State of Pennsylvania, to Lurgan, State of Pennsylvania; that at Lurgan, State of Pennsylvania, these two lines of railway had a physical connection;

That on the first day of May, 1909, the respondent and the Western Maryland Railway Company entered into an agreement which appears in the record of this case beginning on page 21 thereof, by the terms of which freight trains were "to run through between Hagerstown and Rutherford in both directions," "the crews of each road to run through with their engines over the line of the other Company" and "each company to compensate the other for the use of the other's engines and crew on their line" at a certain fixed rate per hour according to the size of the engine furnished by each Company to the other, but "a division of earnings of the traffic not to be disturbed or in any way affected by this arrangement"; and each company to receive the freight earned by such trains while running on its line of railway.

This agreement further provided that "each Company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road," "each Company to have the right to object and to enforce objections to any unsatisfactory employe of the other running upon its line," and "the employes of each Company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company."

That in accordance with this agreement freight that arrived in the yards of the Western Maryland

Railway Company at Hagerstown, Maryland, and destined to Rutherford, Pennsylvania, was made up into trains by the Western Maryland Railway Company and with its engines and crew was hauled to Lurgan, Pennsylvania, as its trains. This train ran on to Rutherford, Pennsylvania, as the train of the respondent but with the same engine and crew, the respondent paying to the Western Maryland Railway Company the hire for the engine and crew at the rate per hour fixed by said agreement from the time said train reached Lurgan, Pennsylvania, until the engine arrived on the fire track of the respondent at Rutherford. This engine and crew were subject to the orders and directions of the respondent as provided in said agreement and at such time as it desired were sent with a train, made up at its yard at Rutherford, to Lurgan and on to Hagerstown, the respondent paying the Western Maryland Railway Company for the engine and crew the price per hour fixed by the agreement, from the time said crew was called by it at Rutherford until said engine and crew arrived at the telegraph office at Lurgan. The crew leaving Rutherford was required to add to the train as it proceeded on its way, such cars of the respondent on its line as it might direct.

That John M. Hull, the petitioner's decedent, was in the general employ of the Western Maryland Railway Company on the 16th day of March, 1917. With other members of his crew he worked, under the aforesaid agreement between the said railroad Companies, as a brakeman taking a train from Hagerstown, Maryland, to Rutherford, Pennsylvania. About 12.15 A. M. on the 17th day of March, 1917, with the other members of his crew, he was directed by the yardmaster of the respondent, at its Rutherford yard, to take a train of cars from that yard to Lurgan, Pennsylvania, and on to Hagerstown, Maryland. This train had theretofore been made up by the respondent in its yards and contained freight

and merchandise delivered to the respondent for transportation and was destined to Hagerstown, Maryland. Before leaving the Rutherford yard the crew of this train was ordered by the yardmaster of the respondent to pick up seven additional cars of freight from the respondent's line of railway at Harrisburg and before reaching Lurgan and add them to the said train. While the petitioner's decedent was so doing he was negligently killed by being run over by a locomotive of the respondent. The negligence of the respondent consisted in running the locomotive, which killed the petitioner's decedent, backward at night without any light and without giving any notice of its approach by the ringing of a bell or otherwise, although the employe of the respondent in charge of the locomotive knew that the crew of which the petitioner's decedent was a member was working on and along the track on which said locomotive was running; and in the failure of those in charge of said locomotive to heed a signal given by a fellow member of John M. Hull's crew to stop the locomotive and as a consequence of that negligence the said locomotive ran over the petitioner's decedent and killed him.

The evidence further tends to show that the respondent, before permitting the enginemen and conductors to operate trains over its lines under the said agreement, examined such enginemen and conductors as to their fitness and after the petitioner's decedent was killed furnished, as a brakeman to take his place, a person in its general employ.

The evidence further shows that the decedent left no widow, child nor father, but did leave surviving him his mother and that his said mother had a reasonable expectation of pecuniary benefit to arise from the continuance of the life of the said decedent.

THE QUESTION RAISED.

The question arising in this Court is, did the petitioner introduce sufficient evidence

to permit the jury to pass upon the question as to whether or not the petitioner's decedent was, at the time of the injuries stated, an employe of the respondent within the meaning of the Federal Employers' Liability Act or, was he such an employe as a matter of law?

HOW THE QUESTION WAS RAISED

At the close of the petitioner's evidence in the trial Court the respondent offered the following prayer, to-wit:

DEFENDANT'S FIRST PRAYER

"The Defendant prays the Court to instruct the Jury that under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover and their verdict must be for the defendant"; which instruction over the objection and exception of the petitioner, the trial Court granted on the theory that under the case as made out by the plaintiff, the petitioner's decedent, as a matter of law, was not an employe of the respondent within the meaning of the Federal Employers' Liability Act. This is the only question passed upon by the Court of Appeals of Maryland.

BRIEF AND ARGUMENT

Where one in the general service of another performs work in which that other and a third person are both interested, he remains the servant of that other or becomes the servant of the third person according as the work in its doing is the work of that other, or is, in its doing, the work of the third person.

And this principle is true no matter who hires, pays or has the power to discharge the servant.

Standard Oil Company vs. Anderson, 212 U. S. 215.

Murray vs. Currie, L. R. 6 C. P. 24.

Rourke vs. White Moss Colliery Company, L. R. 2 C. P. Div. 205 (1877).

Byrne vs. Kansas City Ft. S. & M. R. Co. 61 Fed. 605.

Donovan vs. Construction Syndicate 1 Q. B. (1893) 629.

Powell vs. Construction Company 88 Tenn. 692-13 S. W. 691.

Miller vs. Railroad Company 76 Iowa, 655-39 N. W. 188.

The law imposes upon a railroad corporation the non-delegable duty of the operation of its road.

Central Transportation Co. vs. Pullman's Palace Car Company, 139 U. S. 24.

One who performs the non-delegable duty of another with the knowledge and assent of that other becomes the employe of him for whom he is performing the work.

Atlantic Coast Line R. R. Co. vs. Treadway's Administratrix 120 Va. 739-93 S. E. 560.

Responsibility of one for the manner of the performance of the work of another always creates the relation of employe and employer.

North Carolina Ry Co. vs. Zachary 232 U. S. 248.

The petitioner, therefore, respectfully submits that the judgment of the Court of Appeals of Maryland should be reversed.

In the absence of attorneys for petitioner, they agree to submit the case without oral argument on their behalf.

CHARLES D. WAGAMAN,
OMER T. KAYLOR,
FRANK G. WAGAMAN,
Attorneys for Petitioner.

No. 151

JAN 2 1920
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ELIZABETH HULL, ADMINISTRATRIX OF JOHN M. HULL, DECEASED, FOR THE BENEFIT OF ELIZABETH HULL, MOTHER OF DECEASED,

Petitioner.

vs

THE PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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In the Supreme Court of the United States.

ELIZABETH HULL, Administratrix of JOHN M. HULL, deceased, for the benefit of ELIZABETH HULL, mother of deceased,
Petitioner

vs

THE PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation,
Defendant in Error

No. 151
Oct. Term, 1919

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court for Washington County, under the Federal Employers' Liability Act of April 27, 1908, (35 Stat. at L. 65, Chap. 49), as amended by the Act of April 5, 1910, (36 Stat. at L. 291, Chap. 143), to recover the pecuniary loss the plaintiff is alleged to have sustained by reason of the injuries received by her son, John M. Hull, on the 17th day of March 1917, in the Harrisburg, Pennsylvania, yard of the defendant, which resulted in his death.

The declaration, as amended, (Record pp. 2-6), contains three counts, all of which allege that the plaintiff's decedent was, at the time he received the injuries complained of, a servant and employee of the defendant, and engaged in the performance of his duties, as such, in interstate commerce.

Two pleas, (Record p. 6), were filed to the declaration, one the general issue plea and the other a special plea, denying that the plaintiff's decedent was a servant or employee of the defendant.

Issue was joined on these pleas.

At the trial, the plaintiff offered evidence estab-

lishing that her decedent was in the general employment of the Western Maryland Railway Company, as a freight brakeman, and under orders from that Company, had made a continuous run, with a crew, all of whom were employees of the Western Maryland Railway Company, on a freight train, hauled by a Western Maryland engine, operated by Western Maryland employees, from Hagerstown, Maryland, to Lurgan, Pennsylvania, over the line of the Western Maryland and from Lurgan to Rutherford, Pennsylvania, over the line of the defendant.

That afterwards, at 12:15 A. M. on March 17, 1917, the Western Maryland engine, the Western Maryland engine crew and the Western Maryland train crew, were called to make the return run from Rutherford to Lurgan over the line of the defendant and from Lurgan to Hagerstown over the line of the Western Maryland; that Warner, the conductor, was instructed to pick up seven cars, which were to go to Hagerstown, in the Harrisburg yard of the defendant and that just after these cars were coupled to the train the plaintiff's decedent received the injuries which resulted in his death.

The plaintiff, also, offered evidence, for the purpose of showing that the injuries received by the plaintiff's decedent, were due to negligence on the part of certain employees of the defendant and for the purpose of establishing that her decedent was at the time, a servant and employee of the defendant, the plaintiff offered in evidence the agreement between the defendant and the Western Maryland, (Record p. 21), dated May 1st, 1909, under which agreement through freight trains were run between Rutherford and Hagerstown.

At the close of the plaintiff's case, at the request of the defendant, the Circuit Court directed a verdict for the defendant, on the grounds, first: that the plaintiff had offered no evidence legally sufficient to establish negligence on the part of the defendant and second: that she had offered no evidence legally sufficient to establish that her dece-

dent was a servant or employee of the defendant (Record p. 27).

An appeal was taken by the plaintiff to the Court of Appeals of Maryland and the Court affirmed the judgment of the lower Court, on the ground that John M. Hull, the plaintiff's decedent, was not a servant or an employee of the defendant, within the meaning of the Federal Employers' Liability Act and did not discuss the question of whether or not the plaintiff had offered any evidence legally sufficient to establish negligence on the part of the defendant.

BRIEF AND ARGUMENT.

The suit having been brought under the Employers' Liability Act, it was necessary for the plaintiff both to allege and prove that her decedent, John M. Hull, was, at the time he received the injury resulting in his death, an employee of the defendant and as such employee, engaged in interstate commerce.

The language of the Act is: "Shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, etc."

This Court in the case of Robinson vs. Baltimore and Ohio Railroad Company, 237 U. S. 84, held that the words "employee' and "employed", were used in the Act in their natural sense and were intended to describe the conventional relation of employer and employee.

In this case, Robinson, a porter on a Pullman car, which was part of a train being operated by the railroad company and who was required to obey the rules and regulations of the railroad company and who collected railroad tickets and fares from passengers coming on the train after three o'clock A. M., sought to recover from the railroad company.

This Court held that he was not an employee, within the meaning of the Act. Justice Hughes in the opinion said:

> "We are of the opinion that Congress used the words "employee" and "employed"

in the statute in their natural sense, and intended to describe the conventional relation of employer and employee.

It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

See also—

Chic. & Alton Ry. Co. vs. Wagner 239 U. S. 452.

Fowler vs. Pennsylvania R. R. Co., 229, Fed. 375.

In a suit by an express messenger, who was required to obey the rules and regulations of the railway company and who also handled baggage for it, it was held that he was not an employee of the railway company within the meaning of the Act, the Court saying:

"The language of the Act of Congress carries with it the idea and essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business, to be commissioned and intrusted with the management of his affairs. In our judgment, the words "while employed by such carrier", construed in connection with the context, is equivalent to, "while hired by such carrier," which implies a request and a contract for compensation. The persons falling within the meaning of the Act are those hired by the railway company, or those working for it at its request and under an agreement on its part to compensate them for their services."

Missouri, K. & T. Ry. Co. vs. West (Okla. 1913) 134 Pac. 655; 658.

The only evidence offered by the petitioner for the purpose of establishing that her decedent was an employee of the defendant, was, that he was a regular employee of the Western Maryland Railway Company; the agreement between the defendant and that Company; (Rec. p. 21) and that by virtue

of that agreement and under orders of the Western Maryland, he had, with a Western Maryland train crew, run on a train, drawn by a Western Maryland engine, operated by a Western Maryland engine crew, a continuous trip from Hagerstown to Lurgan over the line of the Western Maryland and from Lurgan to Rutherford over the line of the defendant and had, with the same crew and the same engine, been called to make the return trip and while making the return trip received the injury, while still on the line of the defendant.

The well established rule, laid down in the numerous "Carriage Cases," that, when a carriage and also the driver thereof, are furnished to a hirer, the driver remains the servant of the owner, with whom his contract of employment was made, and does not become the servant of the hirer, although for the time being, the driver may be under the direction of the hirer, applied to this case, shows that Hull remained the employee of the Western Maryland, for the engine and crew were hired by the defendant from the Western Maryland, for a stipulated sum an hour.

"Each Company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour:"—(Agreement, Paragraph 5. Rec. p. 21).

Little vs. Hackett, 116 U. S. 366.

Bentley, Shriver & Co. vs. Edwards, 100 Md. 652.

Quarman vs. Burnett, 6 Mees & Welsby 499.

In the Court of Appeals of Maryland the attorneys for the petitioner relied especially upon two cases:

Standard Oil Company vs. Anderson, 212 U. S. 215.

North Carolina Ry Co. vs. Zachary 232 U. S. 248.

In the Anderson case the Court held that a winchman, a general employee of the Standard Oil Company, did not become pro hac vice the employee of a stevedore who was loading a vessel for the Standard Oil Company and who was to pay the Standard

Oil Company, an agreed compensation, per thousand pounds for the hoisting.

The petitioner relied upon the fact that the Court, in discussing the question of whose servant, the winchman was, said, that, such question is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.

The Court, however, further said:

"Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation where the work furnished is part of a larger undertaking."

The existence of the right of control of one person over another in the performance of work does not create between them the relation of master and servant, but follows from that relation.

The power of control is the result of that relation and not its cause.

It is true that the relation usually accompanies the power of control, but if the power of control can be ascribed to or is created by some other cause other than the existence of the relation, the fact that it exists should not be considered in determining whether or not the relation exists.

Hull was under the limited control of the defendant, that is, while on its line he was required to obey its rules, regulations and orders because in order to secure safety in the operation of trains, it was necessary that he should be, not because the relation of master and servant existed between Hull and the defendant. Therefore, the fact that he was under such limited control cannot have any weight in determining the question of the existence vel non of the relation of master and servant between them.

Trains of the defendant and also of other companies, in addition to trains operated by the crews of the Western Maryland, were run over the line of the defendant and the work being done by Hull and the crew of which he was a member, was a part of a larger undertaking. Hull and the other mem-

bers of the crew were under the control and direction of the defendant to the extent only that was necessary for the safe operation of trains over the road. The Western Maryland was the one that directed the men to perform the service and that designated what particular persons should perform that service, and that had the power to discharge or discipline them.

Nor was the service being rendered by Hull and the crew, the service of the defendant. It is true, the defendant would derive some benefit from it, but so would the hirer of a carriage with a driver be benefited by the service of the driver. The crew was rendering service to and doing the work of its employer, the Western Maryland, which it, the Western Maryland, had agreed to do and for which it was to be paid a stipulated sum, irrespective of what the Western Maryland was to pay the crew and for which service the Western Maryland paid the crew.

The decision in the Zachary case was based on the local law of North Carolina. This Court holding, that as the law of North Carolina, was; "that, although a railroad lease, as between the parties may have the effect of an ordinary lease, yet with respect to the railroad operations, conducted under it and everything, that relates to the performance of the proper duties assumed by the lessor under its charter, such a lease certainly so far as it concerns the rights of third parties, including employees as well as patrons, constitutes the lessee, the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible," the employment of the plaintiff and the operations of the railroad by the Southern Railway Company, the lessee, was the same as if it had been done directly by the North Carolina Railroad Company, the lessor; and that the Southern Railway Company was, under the law of North Carolina, the agent of the North Carolina Railroad Company and that, therefore, the acts of the Southern Railway Co. in oper-

ating the road and employing the plaintiff and others, were the acts of the North Carolina Railroad Company.

No such relations existed between the Western Maryland Railroad Company and the defendant, in this case.

The Western Maryland was in no sense the agent of the defendant either, in operating its railroad or in employing Hull and other trainmen.

The Court of Appeals of Maryland, in its opinion, quoted from the Zachary case and clearly distinguished it from this case. (Rec. p. 41).

The Western Maryland employed the petitioner's decedent; it directed him as to what work he should do and as to where he should work and received the benefit of his work, by way of compensation therefor, from the defendant.

That he was, while on the road of the defendant, subject to its rules and regulations, did not place him in its service or under its control except in so far as was necessary for the safe and proper operation of the larger undertaking being carried on by the defendant.

He was required to obey the rules and regulations of the defendant, as a condition of use not of service.

Zeigler vs. Danbury & N. R. Co. 52 Conn. 543, 2 Atl. R. 462.

Tierney vs. Syr. B. & N. Y. R. Co. 85 Hun. 146, 32 N. Y. Supp. 625.

Sullivan vs. Tioga R. Co. 112 N. Y. 643, 20 N. E. 569.

Bosworth vs. Rogers, 82 Fed. 975.

Hamble vs. A. T. & S. F. Ry. Co. 164 Fed. 410.

Phillips vs. C. M. & St. Paul Ry. Co. (Wis.) 25 N. W. 544.

McAdow vs. Kansas City & Western Ry. Co. (Mo.) 164 S. W. 188.

Kastl vs. Wabash R. Co. 114 Mich. 53, 72 N. W. 28.

Labatt, Master & Servant (2nd. ed.) 83 note (C).

In the case of P. W. & B. Ry. Co. vs. Bitzer 58 Md. 372, Bitzer was employed by the Baltimore and Ohio Railroad Company and it was his duty to drive through cars between Camden Station of the Baltimore and Ohio to President Street Station of the defendant, under an agreement entered into by these two companies and other railroads, for the purpose of securing comfort, speed and safety in the through passenger travel between Washington and New York, and was killed on the line of the defendant through negligence of its employes. In a suit against the Philadelphia, Wilmington and Baltimore, it was held that Bitzer was not pro hac vice an employee of the defendant and whatever effect the agreement might have upon the parties to it, it could not alter or change the relations of the parties to it towards third parties, nor have the effect of making those, who were employed and paid wages by any of the contracting parties, the employees of any of the others.

The case of Zeigler vs. Danbury & N. R. Co. 52 Conn. 543, 2 Atl. 462, cited above, is almost exactly this case, the only practical difference being that this case is based on the Federal Employers' Liability Act.

The facts of the case are as follows:

There was an agreement between the Shepaug Railway Company and the Danbury & N. R. Co., "by virtue of which the Shepaug Company furnished to the defendant an engine, engineer, fireman, conductor and brakeman, to run the Litchfield freight train from Danbury to Hawleyville and back, each day, for an agreed price, payable monthly;" the defendant exercised control over the train while on its road; the trainmen were subject to the rules and regulations of the defendant, while on its road and the defendant had the power to discharge them for any neglect or improper conduct while on its road.

The plaintiff was a brakeman on this train, em-

ployed and paid by the Shepaug Company and was injured while on the road of the defendant, through the negligence of the defendant.

The Court held that the plaintiff was not an employee of the defendant.

The Court on page 465, of 2 Atlantic, said:

> "The Shepaug Company did not lose the entire control of the men while on the defendant's road, but had a general supervision over them, subject, of course, to the rules and regulations of the defendant, and to such special orders as its officers might give, and might discharge them for any cause it might deem sufficient, although the defendant might consider it otherwise. * * * For similar reasons no such presumption can arise from the control which the defendant reserved to itself over the train while on its road. That, evidently, was intended to avoid the inconvenience and peril that would result from moving different trains on its road operated by different rules. It was reasonable that the defendant should retain the absolute control over all trains on its road. Its own safety required it. To that end, the power to discharge the trainmen on the Litchfield train for neglect or improper conduct was essential."

And on page 466 that the plaintiff could not be regarded as the defendant's servant; "without involving this consequence, which is well nigh an absurdity; that the plaintiff's employer changed every time he passed from one road to the other."

While a general servant of one master may become pro hac vice the servant of another master, in order for him to become such, it is necessary both that the servant either expressly or impliedly consented to become such and to transfer his allegiance from the master who employed and who pays him, to the new master and that there should be the purpose and intention on the part of the new master that his allegiance shall be so transferred.

The servant cannot, at the same time and in the

performance of a particular service, be the servant of both his general master and of another person. If he becomes the servant of another in the particular work he is doing, he cannot be the servant of his general master in that particular work.

There was no evidence offered in this case tending to establish that John M. Hull or any other employee of the Western Maryland knew anything in reference to the agreement between the two companies, or that while running upon the tracks of the defendant that he expressly or impliedly accepted the defendant as his master.

The only evidence is that the Western Maryland employees were instructed by the Western Maryland to obey the rules and regulations of the defendant while running upon its tracks, and that a book of rules and regulations of the defendant were furnished by the Western Maryland to those of its employees who ran upon the defendant's tracks.

It being admitted that Hull was the general employee of the Western Maryland, the burden of proof was upon the plaintiff to establish that he either expressly or impliedly agreed to accept a change of masters.

P. W. & B. Ry. Co. vs. Bitzer 58 Md. 372.

Del. L. & W. R. Co. vs. Hardy (N. J. L.) 34 Alt. 986.

> "I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, become, pro hac vice, B's servant, in such sense as not only to disable him from recovering from B, for injuries sustained through the fault of B's proper servants, but to exclude the liability of A, for injury occasioned by his fault to B's own workmen. In order to produce that result, the circumstances must in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment."

Morgan vs. Smith, 159 Mass. 570, — 35 N. E. 101.

Berry vs. N. Y. Cent. & H. R. R. Co. 202 Mass. 197, 88 N. E.

The plaintiff offered the agreement between the defendant and the Western Maryland, (Rec. p. 27), for the purpose of showing whose employee Hull was.

The agreement shows that it was not the intention or purpose that the employees of one company should change masters every time they passed from the road of one to the road of the other, but that they should remain the employees of the company who actually employed them and paid them their wages.

In addition to the fifth paragraph which provides: "Each Company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour:" the fourth paragraph is "crews of each road to run through with their engines over the line of the other Company." The seventh: "Each Company to furnish fuel and other supplies to its own engines and crews; * * * The sixteenth: "Each Company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs. The seventeenth: "Each Company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines." The eighteenth: "All cases of violations of rules and other derelictions by the employees of one Company while upon the road of the other shall be promptly investigated by the owning Company and the result reported to the employing Company, with or without suggestions for disciplining, the employing Company to report to the other the action taken." The nineteenth: "Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one Company is operating on the road of the other, a copy must be sent to the proper officer of each Company." The twentieth: "Em-

ployees of each Company to be required to report promptly on notice, to the proper officer of the other, for investigation of accidents, etc." The twenty-first: "The employees of each Company while upon the tracks of the other, shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company."

Each one of these paragraphs, as well as the agreement taken as a whole, shows that the crews employed by one Company remained the employees of that Company while upon the line of the other; that they were under the general control of the Company which employed them and were required to obey the rules, regulations and orders of the Company upon whose lines they were operating, as a duty owing to their employer, who paid them their wages and agreed that they should do so and in furtherance of the employer's business for which their employer was paid a certain sum, without reference to the amount paid to them by their employer.

If Hull had been injured through negligence on the part of another member of the Western Maryland crew, of which he was a member, and suit had been brought against that Company, could the defense that he was not an employee of the Western Maryland have been maintained? Would not any Court have decided that he, having entered into a contract of employment with that Company, could not be transferred to the employment of another company without his knowledge or consent?

If so, he cannot, in this case, be held to be an employee of the defendant.

Or if the suit had been brought outside of the Act, could the defense that the employees of the defendant were fellow servants of Hull have been maintained? Surely not and if not, there can be no recovery in this case.

A number of tests are stated, by the authorities, as pertinent in determining which one of two per-

sons is the master of a servant engaged in a particular work:

1. Which one made the contract of employment with the servant.
2. Which one paid his wages.
3. Which one had the power of selecting and discharging the servant.
4. Which one had control and authority over the servant.
5. For the benefit of which one was the work being done.

It is conceded that the Western Maryland entered into the contract of employment with Hull; that it paid his wages and that it and it alone had the power of selecting and discharging him.

The Western Maryland was also the one that had control of Hull. It was the Western Maryland that decided that Hull was to make the run with the rest of the train crew and directed him to do so. The defendant had no authority or control over Hull whatever, except that he was required to obey its general rules and regulations, while on its lines. This his employer agreed he should do and it was a duty owing by him to that employer.

The Western Maryland also received the benefit of his work. He was doing it by reason of and under his employment by that Company, which was receiving compensation for it.

So under no test could Hull be held to be the servant of the defendant.

But, as said by the Court of Appeals of Maryland, this case does not turn on nice distinctions as to whether a person can be said to be a servant of one master under certain facts and the servant of another master under certain other facts, but whether or not Hull was an employee of the defendant within the meaning of the Federal Employers' Liability Act.

Surely Hull was not an employee of or employed by the defendant in the natural sense, or in other words, the common understanding of the meaning of the words, especially when neither Hull nor the

defendant thought or considered that any such relations existed between them.

For the "conventional relation of employer and employee," to exist, there must be a coming together or an agreement by the parties that the relation shall be created.

Conventional is defined as:

> "Arising from, and dependent upon the act of the parties, as distinguished from legal, which is something arising from act of law."
>
> 1. Bouvier's Law Dictionary, 360.
> 2. Blackstone, Comm. 120.

> "A 'conventional division of the charges' obviously means an apportionment of the charges by agreement of the participating carriers."
>
> Mutual Transit Co. vs. United States
> 178 Fed. 664-668.

> "Conventional life estates are those made by act, contract or convention of the parties."
>
> Disley & Disley 30 R. I. 366. 75 Atl. 481.

> "Estates for life are divided into conventional and legal estates. The first are created by the act of the parties, and the second by operation of law."
>
> 4. Kent's Com. (12th Ed) p. 25.

In the absence of attorneys for the defendant, it agrees to submit the case without oral argument on its behalf.

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